May 5. Affirmed Chase C.J.

Read

# SUPREME COURT OF THE UNITED STATES.

No. ~~265.~~ ~~141~~ 71.

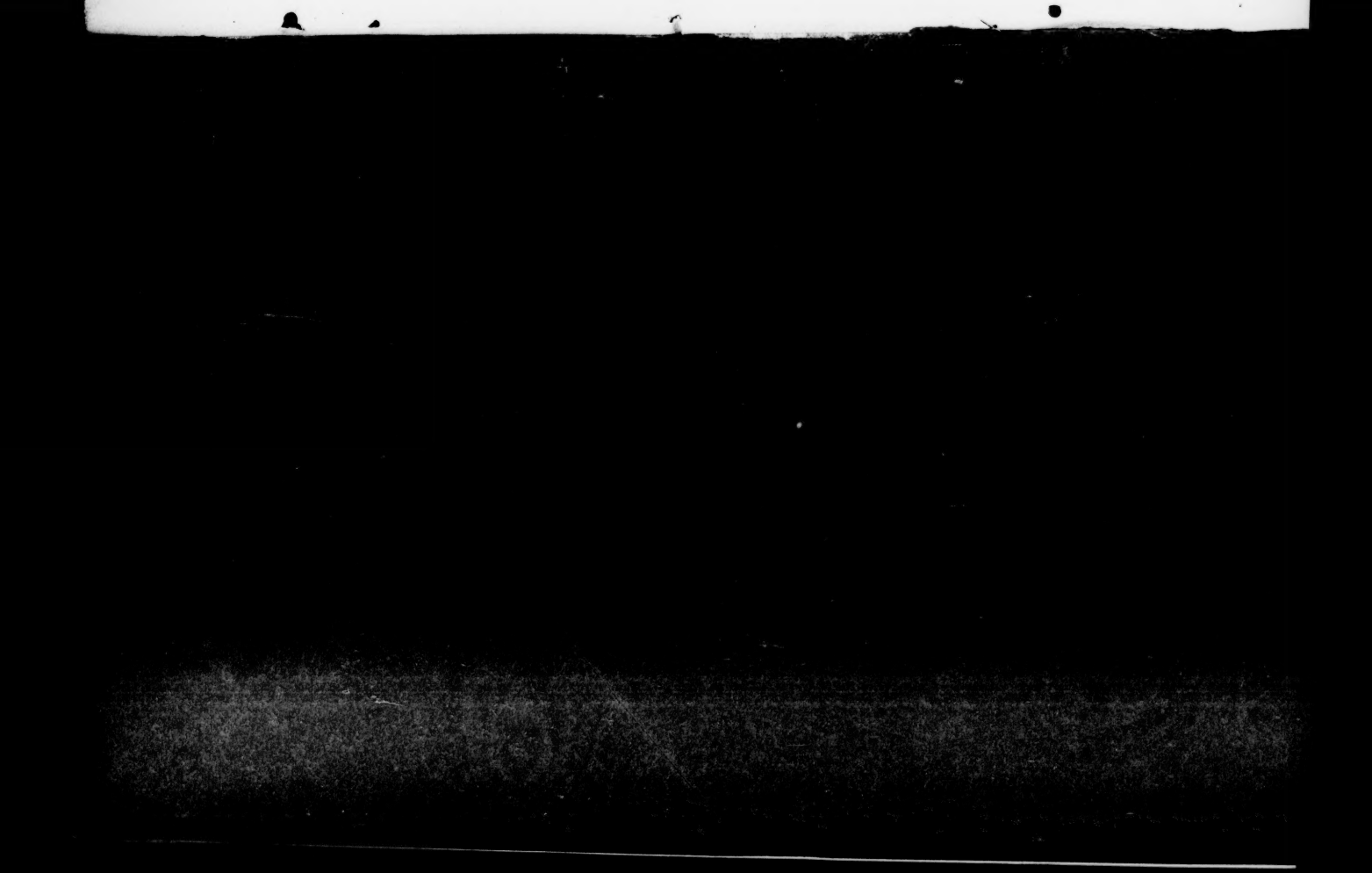
NATHANIEL G. GILMAN, ET AL., COMP'TS AND APPELLANTS,

vs.

THE CITY OF PHILADELPHIA, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

GOVERNMENT PRINTING OFFICE.



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Harding.—F. Carroll Brewster.

NATHANIEL G. GILMAN, of Exeter, in the State of New Hampshire, and a citizen of said State; CHARLES J. GILMORE, of Brunswick, in the State of Maine, and a citizen of said State; ELIZABETH GILMAN, of Exeter, in the State of New Hampshire, and a citizen of said State; and GARDINER GILMAN, of Exeter, in the State of New Hampshire, and a citizen of said State,

*vs.*

THE CITY OF PHILADELPHIA, a corporation established and created by the authority of the Commonwealth of Pennsylvania, and RICHARD MCGRANN, GEORGE CLARK, and DENNIS KENNEDY, all of Philadelphia, in the State of Pennsylvania, and citizens of said State, and STRICKLAND KNEASS, of Philadelphia, State of Pennsylvania, and a citizen of said State.

1861, November 15. Bill filed.

1862, June 17. Answer filed.

1863, October 2. F. Carroll Brewster, esq., appears for defendants.

1863, October 14. And now, to wit, October 14, 1863, this cause came on to be heard upon bill and answer, and being argued by Mr. Campbell and Mr. Harding, for complainants, and by
2 Mr. F. Carroll Brewster, for defendants, it is ordered, adjudged, and decreed, that the bill of complainants be dismissed with costs; whereupon the complainants appeal, and the appeal is allowed.

3 Pleas before the honorable judges of the circuit of the United States for the eastern district of Pennsylvania, in the third circuit, of October session, 1861. No. 1. In equity.

It is thus contained:

Be it remembered that heretofore, to wit, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-one, Nathaniel G. Gilman, of Exeter, in the State of New Hampshire, and a citizen of said State; Charles J. Gilman, of Brunswick, in the State of Maine, and a citizen of said State; Elizabeth Gilman, of Exeter, in the State of New Hampshire, and a citizen of said State, and Gardiner Gilman, of Exeter, in the State of New Hampshire, and a citizen of said State, by their solicitor George Harding, esq., filed of record in the said court, their bill of complaint against the city of Philadelphia, a corporation established and created by the authority of the Commonwealth of Pennsylvania, and Richard McGrann, George Clark, and Dennis Kennedy, all of Philadelphia, in the State of Pennsylvania, and citizens of said

State, and Strickland Kneass, of Philadelphia, State of Pennsylvania, and a citizen of said State, which bill of complaint is in the words, and of the tenor following, to wit:

In the circuit court of the United States in and for the eastern district of Pennsylvania.—In equity.

4 To the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania:

Nathaniel G. Gilman, of Exeter, in the State of New Hampshire, and a citizen of said State; Charles J. Gilman, of Brunswick, in the State of Maine, and a citizen of said State; Elizabeth Gilman, of Exeter, in the State of New Hampshire, and a citizen of said State, and Gardiner Gilman, of Exeter, in the State of New Hampshire, and a citizen of said State, complainants, bring in this their bill of complaint against the city of Philadelphia, a corporation established and created by the authority of the Commonwealth of Pennsylvania, and Richard McGrann, George Clark, and Dennis Kennedy, all of Philadelphia, in the State of Pennsylvania, and citizens of said State, and Strickland Kneass, of Philadelphia, State of Pennsylvania, and a citizen of said State, defendants.

And thereupon your orators complain and say that they are the owners, in fee simple, of a lot of ground and wharf property, situate on the west bank of the Schuylkill river, between market and Chestnut streets, in the city of Philadelphia, and extending in front or breadth along said river, and to the low-water mark thereof, about three hundred and sixty feet, and extending, in depth, back
5 from said river, about eight hundred and four feet, containing about four acres of ground, as in and by reference to the description hereto annexed, as exhibit to this bill, marked A, will more fully appear.

The title of your orator to that said property, so far as he is advised it is material for him to set forth the same, is derived as follows:

John Gardiner, jr., of the city of Philadelphia, was seized in fee simple of the said premises, and while so seized and in possession, departed this life on or about the 4th day of January, 1830, having first made his will, duly proved and remaining of record in the office of register of wills for the county of Philadelphia, as by reference thereto will fully and at large appear. That afterwards by proceedings for partition in that respect had in the orphans' court for the city and county of Philadelphia, the said premises were ordered and decreed to be sold at public sale by Thomas Bradford, administrator *de bonis non, cum testamento annexo* of the said John Gardiner, jr. That in pursuance of the said order, the said Thomas Bradford did expose the said premises to public sale, and Nathaniel Gilman, then of Philadelphia, now deceased, did, on Wednesday the 21st day of October, 1846, duly purchase the same, and which sale was on the 18th day of December, 1846, duly confirmed; and
6 that afterwards, in pursuance thereof, your orator having duly paid the purchase money, the said Thomas Bradford, by

deed dated June 30th, 1848, (and recorded at Philadelphia, in Deed Book A. W. M., No. 86, p. 151,) granted and conveyed the said premises to the said Nathaniel Gilman, in fee. That he thereby became, was, and up to the time of his death, remained the owner and in possession thereof, and entitled to all the privileges by law appertaining thereto, as in and by the said record, and in and by the said deed to which your orators crave leave to refer and produce, if needful, as your honors may direct will appear.

That the said Nathaniel Gilman, while so seized, died intestate on or about the day of October, 1857, leaving, as heirs-at-law of said property, Nathaniel G. Gilman, Charles J. Gilman, Elizabeth Gilman, Gardiner Gilman, and John G. Gilman.

And your orators further show that said John G. Gilman, one of said heirs-at-law, by indenture dated the 2d day of November, 1861, did grant and convey unto the said Charles J. Gilman all his right, title, and interest in and to the aforesaid property, as will more fully appear by reference to the said deed, which your orators will produce if your honors so direct.

7 And, your honors, further aver that the title of the said Nathaniel Gilman, who so died seized, can, if needful, be set forth at large, and that he and those from whom he claims to have been for forty years in the exclusive and adverse possession of the said premises and every part thereof.

And your orators further show that your orators are now seized in fee of the said property.

And your orators further show that they have a wharf front of 360 feet on said property, and 3 docks, one of four hundred and eight (408) feet in length and 60 feet in breadth; one of one hundred and fifty feet length, and a breadth of 40 feet, and a third, of 28 feet breadth and 300 feet length. Said wharf and docks are capable of accomodating 14 vessels, brigs, schooners, and barges, such as usually navigate the Schuylkill river.

Your orators further show that the river Schuylkill, to and beyond the premises of your orators, is, and for a long time hath been, an ancient navigable public river and common highway, free to be used and navigated by all citizens of the United States.

8 That many citizens of the United States long have been and of right were and still are accustomed to navigate said river, to pass and repass along its course and channel unobstructed and at pleasure, with their ships, brigs, schooners, sloops, barges, steamboats, and water craft of every description, carrying large quantities of freight and conducting a valuable commerce in bituminous and anthracite coal, lime, plaster, lumber, stone, marble, and agricultural products.

That said river is navigable for ships and vessels of the largest description, viz: vessels drawing 18 or 20 feet of water.

That many of said ships, barges, boats, steamboats, and other vessels so navigating the Schuylkill river, are duly enrolled and licensed at the port of Philadelphia, a port of entry within the district of

Philadelphia, under and by virtue of the acts of Congress in that behalf made and provided.

That many other ships, barques, and vessels belonging to citizens of Great Britain, and entitled to certain rights of commerce and navigation, have been for a long time accustomed to, and are of right en-
9 titled to navigate the said Schuylkill river, with cargoes bound to the port of Philadelphia, to enter the same at the said port, and to discharge their cargoes at the wharves of said port bordering on said Schuylkill river, and to load their cargoes at said wharves, and clear direct to foreign ports, and so navigating do pay all duties lawfully chargeable at the said port of Philadelphia.

That your orators have, at great expense, kept the said wharves and docks in repair, for the mooring of vessels navigating the said river, and for the discharging and receiving of their cargoes, for which purpose they are constantly used.

That many such vessels trading between the port of Philadelphia and other ports in the United States, Great Britain, the British colonies, and navigating said river Schuylkill, have, for a long time past, been accustomed to moor at the wharves and in the docks of your orators, and to discharge and receive their cargoes therefrom and thereat; and that your orators have been of right accustomed to receive yearly a large amount of tolls, profits, and revenue, to wit: three thousand dollars for the use of said wharves and docks; that said revenue and profits are received chiefly from vessels and
10 barges which are towed up along said river; that a great part of the brigs, schooners, barges, and other vessels navigating said river, are accustomed to be towed up and down said river Schulkill by steamboats of various sizes.

That the aforesaid property was purchased by the father of your orators, and the improvements made by him with direct reference to the free and unobstructed navigation by the aforesaid vessels of the Schuylkill river, and that the free and unobstructed navigation thereof by, and to and from the wharves and property of your orators as aforesaid, is essential to the use and enjoyment of said improvements, and to the receipts of toll and revenue accruing and to accrue.

That the city of Philadelphia, a corporation created and established by authority of the commonwealth of Pennsylvania and Richard McGrann, George Clark, and Dennis Kennedy, and Strickland Kneass, all citizens of the same State, have collected materials and workmen, and are now engaged in erecting and constructing a bridge across the channel of said river Schuylkill, at Chestnut street, in the said city of Philadelphia.

11 The plan of said bridge in the hands of the workmen, and the parts already commenced, show that it is the intention of said defendants to erect said bridge at an elevation of only thirty-three feet above the ordinary high water surface of the river Schuylkill, and not more than thirty feet above the level of the water during such freshets as occur in said river. That said bridge is unprovided with a draw, and has but a single pier, which is located in the centre of the channel of said river.

And the said defendants threaten to proceed and complete the erection and construction of said bridge, and keep it, when erected, over and across the channel of said river at such elevation only, without a draw and with the pier in the centre of the channel of said river.

Your orator charges that the erecting and keeping said bridge over and across the channel of said river, in manner so proposed and threatened by said defendants, will hinder and prevent the passage of the citizens of the various States of the United States and of foreign States along the said river, as they are commonly accustomed to do,
12 and will obstruct the navigation of said river, will interrupt, hinder, and disturb the citizens in their lawful use and enjoyment of the Schuylkill river, as a common highway in passing and repassing the same; and will hinder and obstruct the free use of licenses granted under an act of Congress, and will hinder and obstruct the subjects of foreign countries in the exercise of their rights of commerce and navigation, will increase the difficulty, hazard, and expense of navigating it by steam, and will interrupt, diminish, and tend greatly to destroy the trade, commerce, and business of the citizens of the United States upon said river, to the great damage and common nuisance of the citizens of the United States, and to their irreparable injury; and will greatly injure and lessen the value of your orator's wharves and property, and will divert commerce and trade therefrom to other wharves upon said river and elsewhere, and will deprive him of, or will diminish and impair the wharfage tolls, revenue, and profit which he hath been accustomed to and otherwise would rightfully receive and enjoy from the moorage, loading and unloading of vessels, and from wharfage and storeage; and will lessen and destroy the commerce and trade carried on from and at
13 your orator's wharves, to his great damage and irreparable injury.

And your orators further aver, that many millions of dollars have been expended by citizens of the United States in the construction of works of public improvement, terminating at the head of the tide water navigation on said river, which depend, in a great measure, for their prosperity and usefulness and value, upon the free and unobstructed use of the said river.

And your orator is informed that the said defendants pretend and claim a right to erect and keep said bridge across said river, under and by color of an act of the legislature of the State of Pennsylvania, approved , 1852, and various supplements thereto.

And that they, the defendants, pretend that the said bridge, so constructed, will afford sufficient passage to vessels navigating said river, and will permit the channel thereof to be and remain free and unobstructed.

But your orators charge that the Schuylkill river being a navigable river, having a good tide-water navigation extending to and beyond the property of your orator, and for about seven miles
14 from its mouth, and being a branch of the river Delaware, which river passes by and between the States of New Jersey and

Delaware, the citizens of neighboring States and of all of the United States, are lawfully entitled to its free navigation and to carry on their lawful commerce, without hindrance or obstruction by the defendants, under and by virtue of any State authority; and further, that the proposed passage ways, under said bridge, are utterly inadequate to meet the requirements of the present commerce and navigation of said river; and that no bridge affording less than 50 feet headway and a clear channel of less than 100 feet would be sufficient to afford a free and unobstructed passage to vessels and barges in the manner in which they are now accustomed to use and navigate the said river.

Your orators had well hoped that the citizens of the United States navigating said river would have remained and continued in the undisturbed enjoyment of their rights to navigate and use the same as a common highway without hinderance or obstruction, and that the said defendants would not have obstructed the same, or at
15 least would erect said bridge at a proper height and with sufficient draws, so as not to obstruct and interfere with the navigation of the said river, as they well might do.

And your orators, through their counsel, before any preparation was made for the erection of said bridge, informed said defendants that any unlawful obstruction to the navigation of the river Schuylkill was regarded as an injury to the rights of navigators and wharf owners on the Schuylkill river, and as such would be resisted, and that the erection of such bridge as is herein mentioned, and is now proposed to be erected, would be held and regarded as such obstruction.

But the said defendants, disregarding the rights of the citizens of the United States accustomed to navigate the said river, threaten to erect and continue a bridge at the height of thirty-three feet above ordinary high water, thirty-nine feet above low water, and about thirty feet above the extraordinary high water of said river, without any draw or draws, and with a pier in the centre of the channel of said river, although it is well known, and your orators charge the fact to be, that vessels now navigating the Schuylkill
16 river at the part of the channel where the bridge is about to be erected, require a headway of 50 feet above the stream, and an uninterrupted width of channel of 100 feet. That the navigation of the river at this point is troublesome and hazardous, unless a wide channel and a headway of at least 50 feet above high water is allowed. That the available channel of the river to vessels under tow is injured by said bridge and rendered slow and dangerous. That the whole system of towage as pursued upon said river must be changed, and a much more expensive and inefficient mode adopted.

And your orator charges that the said defendants, in erecting said bridge, are disregarding the rights of your orators and other citizens owning property and engaged in and depending upon the commerce and trade of the Schuylkill river, and are erecting a common and public nuisance to the citizens of the United States, and will do in-

jury to your orators and to all citizens of the United States who are entitled to navigate said river without obstruction; all of which actings and doings of the said defendants are contrary to equity and good conscience, and manifestly tend to the injury of your orators.

17 In consideration whereof, and to the end that the defendants may answer the premises, and that they may be restrained by the injunction issuing out of this court, from proceeding to erect said bridge over and across the channel of the river Schuylkill at any less height than 50 feet above the high water surface of the said Schuylkill river, with suitable draws therein, and from erecting the same in any manner so as to obstruct the free navigation of said river as a common and public highway. And that said nuisance, or so much thereof as may be erected may be abated; and that on a final hearing the right of your orators and other citizens of the United States to enjoy the navigation of said river, as a common highway, may be secured to them, and that your orator may have such other and further remedy and relief in the premises as the nature of the case and equity and good conscience may require.

May it please your honors to grant unto your orators a writ of injunction issuing out of said court, directed to the city of Phil-
18 adelphia, Richard McGrann, George Clark, and Dennis Kennedy, and Strickland Kneass, restraining and preventing them, their servants, or agents, from erecting or proceeding to erect any bridge over or across the channel of the river Schuylkill, so as to obstruct the free navigation and common use thereof, and especially from erecting any such bridge at a less height than 50 feet above the high water surface of the said river, and with suitable draws therein, as also a writ of subpœna, to be directed to the said city of Philadelphia, Richard McGrann, George Clark, and Dennis Kennedy, and Strickland Kneass, thereby commanding them, and each of them, at a certain day and under a certain pain, to be therein limited, personally to be and appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

And your orators will ever pray.

GEO. HARDING,
*Sol'r for Comp't.*

19 UNITED STATES,
*Eastern District of Pennsylvania, sct.:*

On this fourteenth day of November, A. D. 1861, before me, Charles F. Heaslitt, a commissioner appointed by the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, under the laws of the United States to take affidavits and acknowledgments of bail, &c., personally appeared Charles J. Gilman, who, being duly sworn, did depose and say that he is one of the within named complainants; that he has read the

foregoing bill of complaint, and knows the contents thereof, and that the same are true so far as they are therein stated, upon and of his own knowledge, and so far as they are therein stated on information and belief, he believes them to be true.

CHARLES J. GILMAN.

Sworn and subscribed before me the day and year above written.

CHA'S F. HEASLITT.
*U. S. Com'r.*

EXHIBIT "A."

All that certain wharf property and piece or tract of land, together with the several buildings thereon erected, situate, lying, and being in the borough of West Philadelphia, on the west side of the river Schuylkill, in said county of Philadelphia, and bounded and described as follows, viz: Beginning at low-water mark of said river Schuylkill, and on the south side of the road leading from Philadelphia to Lancaster, otherwise called High or Market street continued, and from thence extending along the south side of the said road, or Market street continued, bounding thereon north seventy-eight and a half degrees, west about six hundred and twenty-four feet, more or less, to a point on the east side of Bridgwater street, and south said of the aforesaid Market street continued, in the aforesaid borough of West Philadelphia; thence along the east side of the aforesaid Bridgewater street and bounding thereon south, eleven degrees fifty minutes west, one hundred and sixty-five feet to a corner on the line of land now or late of William Rose; thence, by the said land now or late of William Rose, two next following courses and distances, to wit, south seventy-eight and one-half degrees east, and parallel with the south line of the aforesaid High or Market street continued, thirty-one feet five inches, more or less, to a stone, and south fifty degrees and a half east, five hundred and seventy-seven
21 feet and six inches or thereabouts, to the low-water mark of the said river Schuylkill, and thence up the said river and foundry thereon, at low-water mark aforesaid, to the place of beginning, excepting and reserving out of the said tract of land a certain lot or piece of ground, now or late the property of the President, Directors, and Company, for the erecting a permanent bridge over the river Schuylkill, at or near Philadelphia, beginning at a point on the south side of the aforesaid road leading from Philadelphia to Lancaster, otherwise called Market or High street continued, near to a post placed at the western termination of the southern wing-wall (or southern wall extended from the aforesaid permanent bridge) on the western side of the said river Schuylkill, of the aforesaid permanent bridge; thence southwardly, at right angles, to the southern line of the aforesaid road from Philadelphia to Lancaster, otherwise called High or Market street continued, one hundred feet to a stone, and from said stone, at right angles, to the said line of one hundred feet eastwardly to low-water mark in the river Schuylkill; and thence along the low-water mark of the said river Schuyl-

kill, bounding thereon to the southern line of High street continued, west of the river Schuylkill, and also other than and except a certain street or passage laid out, and to be kept open forever for the use of the President, Directors, and Company, for erecting a
22 permanent bridge over the river Schuylkill, at or near the city of Philadelphia, and John Gardiner, jr., their heirs successors and assigns respectively, that is to say, a street or passage forty feet in width, clear of all buildings and incumbrances, to run on the western side of the aforesaid last mentioned lot from the southern line of High street, otherwise called Market street continued, west of the river Schuylkill to the southern end of the aforesaid lot, as will more fully and at large appear by reference to certain deed of release and quit claim from the President, Directors, and Company for erecting a permanent bridge over the river Schuylkill at or near Philadelphia, to the said John Gardiner, jr., his heirs and assigns, bearing date the twenty-ninth day of November, A. D. 1811, and recorded in the office for recording deeds, &c., for the city and county of Philadelphia, in Deed Book, J. C., No. 15, page 674, &c.; which is indorsed as follows, to wit:

23 No. 1, October session, 1861. Circuit court, United States, eastern district of Penn'a, Nathaniel G. Gilman *et als.* vs. The City of Philadelphia *et als.*, bill in equity.

Issue subpœna returnable the first Monday of January next.

GEO. HARDING,
*Sol'r for Complainant.*

Filed November 15, 1861.

24 *Answer of defendants.*

And afterwards, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and sixty-two, the answer of the city of Philadelphia and others, defendants, is presented by by their solicitor, Charles E. Lex, esquire; which answer, being read and filed, is in the words and of the tenor following, to wit:

GILMAN
*v.*
THE CITY OF PHILADELPHIA, *et al.* } Circ't c't.—Oct. sess., 1861.—No. 1.—In equity.

*Answer of defendants.*

The defendants answer the material parts of the complainant's bill, in the manner following:

That the river Schuylkill is a river which has both its source and its mouth exclusively within the territory of the State of Pennsylvania, and is navigable for the distance of about seven and a half miles from its mouth.

That the general assembly of the State of Pennsylvania, by an act approved March 27, 1852, provided as follows: "That it shall be

lawful for the commissioners of the county of Philadelphia, and they are hereby required, as soon as practicable, to erect or cause
25 to be erected two good and substantial bridges over the river Schuylkill, one to be located at or opposite Chestnut street, and the other to be erected at or near the point where Girard avenue intersects the river Schuylkill, which bridges shall be constructed upon such piers or abutments as to afford at all times a clear and uninterrupted passage for the water of the river, equal, at least, in area to that now existing at the permanant bridge over the Schuylkill at High street;" and the said county commissioners were further empowered, having first determined upon the site of the bridge, at or near Girard avenue, to advertise in two or more newspapers, inviting seal proposals for building such bridges, agreeably to specifications to be furnished by said county commissioners, "with the proviso" that, before the site, plan, and specifications are agreed upon, the same shall be submitted to the county board, and a majority of said board shall confirm the same before the said commissioners shall be authorized to advertise.

That the county commissioners of the county of Philadelphia, having previously complied with the provisions of said act of assembly, on the 27 day of April, 1853, entered into a contract with Andrew Hagne to erect a bridge over the river Schuylkill, at Girard avenue, but never proceeded to erect a bridge over the said river at or opposite Chestnut street.

26 That by an act of the general assembly of Pennsylvania approved February 2, 1854, (P. L , 1854, p. 24,) it was provided, among other things, "that all the powers, rights, privileges, and immunities of the county board, and the commissioners of the county of Philadelphia," should be vested in the city of Philadelphia, the defendant herein. That by an act of the said general assembly approved May 16, 1857, (P. L., 549.) it is provided as follows: "the councils of the city of Philadelphia are hereby authorized and required to erect, or cause to be erected, over the river Schuylkill, at Chestnut street, the bridge authorized and required to be erected at or near Chestnut street, by an act to authorize the erection of free bridges over the river Schuylkill, approved the 27th day of March, 1852.

That by an ordinance of the city of Philadelphia approved November 20, 1858, entitled "an ordinance for the construction of a bridge over the river Schuylkill, at Chestnut street," to which said ordinance the court is referred, the councils of Philadelphia authorized the erection of a bridge over the river Schuylkill, at Chestnut street, with, among others, the following proviso: the said bridge "to be of such elevation at the soffit of each arch as will give a clear height above high water not less than that at Market street bridge," the said Market street bridge being one and the same with that
27 referred to in the aforesaid act of 1852, and denominated "the permanent bridge over the river Schuylkill, at High street."

That in pursuance to said ordinance a plan was approved by the board of surveyors of the city of Philadelphia, and submitted by S.

Kneass, defendant herein, as chief engineer and surveyor of the city of Philadelphia, to the councils of Philadelphia, who, by a resolution approved April 16, 1860, entitled "Resolution confirming the plan for the Chestnut street bridge," confirmed said plan; which said plan affords at all times a clear and uninterrupted passage for the water of the river greater than that existing at the bridge at Market street, in conformity with the act of assembly approved March, 1852, as aforesaid.

That George Clark, Richard McGrann, and Dennis Kennedy, defendants herein, executed a contract for the masonry and approaches of said bridge, according to the plan aforesaid; which said contract was approved by the councils of Philadelphia, September 16, 1861.

That in pursuance to said contract, said George Clark, Richard McGrann, and Dennis Kennedy, from the 16 day of September last to the present time have been working under said contract, and have collected a large amount of materials, and have received a large amount from the city of Philadelphia, and that it is proposed to construct said bridge in conformity with the plan so approved by councils.

28 That the supreme court of the State of Pennsylvania, in a case entitled "The Board of Port Wardens against The City of Philadelphia and others," and brought to January term, 1862, No. 16, as well as in a case entitled Stephen Flanigan and James Flanigan against the City of Philadelphia, brought to January term, 1862, No. 20, have adjudged and declared that the city of Philadelphia and those acting under it have the lawful power to construct the bridge over the river Schuylkill, at Chestnut street, in the manner contemplated, as a reference to the record of said causes will show.

That the river Schuylkill was an ancient navigable river and common highway in the State of Pennsylvania, but that the same, for various reasons, is at present only navigable with masted vessels for about seven and a half miles from the mouth thereof, and has not been for many years navigable with masted vessels for a greater distance than Market street, which is about five hundred feet north of the present site of Chestnut street, and that vessels with masts do not navigate, except to a very limited extent, that portion of the river Schuylkill contained between Market and Chestnut streets, and in illustration and support of these averments these defendants would state—

29 I. That the mayor, aldermen, and citizens of Philadelphia, in the year 1819–'20, constructed, north of the present site of Callowhill street, a draw and certain water works, which are popularly known as the Fairmount water works, to the extent of which there have been constant additions, and the same, as now existing, will be a permanent construction and forever prevent the free navigation of the river above that point.

II. That the commonwealth of Pennsylvania authorized a bridge over the river Schuylkill, at Callowhill street, and that in 1841 there was erected the suspension bridge at that point, popularly known as the wire bridge at Fairmount, which is without a draw.

III. That before the year 1839, the bridge erected on the site of Market street and denominated in said act of assembly the permanent bridge over the river Schuylkill at High street, was erected under the authority of the commonwealth without a draw, and with no more headway for vessels than will be afforded by the bridge proposed to be erected at Chestnut street.

And that, by reason of the construction of the draw and water works at Fairmount, the suspension bridge at Callowhill street and the permanent bridge at Market street, the river Schuylkill has become a highway more particularly for canal boats, the use of
30 masted vessels being, to a great extent, discontinued, and but seldom seen above the site of the proposed bridge.

That the complainants erroneously aver in their bill that said bridge has but a single pier, which is located in the centre of the channel of said river, unless the word channel is used as equivalent to the river itself, but if used as a term of navigation, said pier is located forty feet from the channel; drawings are attached hereto, showing the direction of said channel and the location of said pier, and the elevation of the said bridge.

That the complainants can in nowise be affected in regard to the revenue and profits accruing to them, except so far as the said bridge shall prevent vessels with masts from loading or unloading at their said wharves.

That the city of Philadelphia is a municipal corporation and possessed of powers of unlimited taxation, conferred upon it by divers acts of assembly of the State of Pennsylvania, and are able to pay to the complainants any damages which may be judicially ascertained to be due them.

That the population of the city of Philadelphia, on the east side of the river Schuylkill, is , and on the west side of the river Schuylkill, is , and that a bridge at Chestnut street is a necessity for public convenience and travel from one point of
31 the city to the other.

Without this there is nothing material requiring answer, and defendants pray to be hence dismissed with their reasonable costs.

In witness whereof, the city of Philadelphia hath caused its corporate seal to be hereto affixed.

ALEXANDER HENRY,
*Mayor of Philadelphia.*

{ The seal of the city of Philadelphia. }

Strickland Kneass, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing answer are true, so far as the same are within his knowledge, and so far as they are stated upon the information of others he believes them to be true.

STRICKLAND KNEASS.

Sworn and subscribed before me this thirteenth day of June, A. D. 1862.

W. W. DOUGHERTY, *Alderman.*

Endorsed as follows: No. 1. October session, 1861. Cir-
32 cuit court. In equity. Gilman *v.* City of Philad'a *et al.* Answer on behalf of all of the defendants. Cha's E. Lex, pro d'f'd'ts.

Filed June 17th, 1862.

33 *Decree.*

And now, to wit, this fourteenth day of October, A. D. 1863, this cause came on to be heard upon bill and answer, and being argued by Mr. St. Geo. T. Campbell and Mr. George Harding, for complainants, and by Mr. F. Carroll Brewster, for defendants, it is ordered, adjudged, and decreed that the bill of complainants be dismissed with costs.

*Appeal.*

Whereupon the said complainants, by their said solicitor, pray leave to appeal from the said decree of the said circuit court for the said district to the Supreme Court of the United States; which said appeal is allowed upon security being given.

(Here follows 2 maps, marked p. 33.)

34 UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania, sct.:*

I, Benjamin Patton, clerk of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, certify the foregoing to be a true and faithful copy of the record and proceedings of the said court for the district aforesaid, in a certain suit in equity therein lately depending, wherein Nathaniel G. Gilman and others were complainants, and the city of Philadelphia and others were defendants.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, this twentieth day of October, A. D. 1863, and in the eighty-eighth year of the independence of the said United States.

BENJ'N PATTON,
*Clerk, C. C.*

Filed November 4, 1863.

1301

# SUPREME COURT OF THE UNITED STATES

**DECEMBER TERM, 1864. No. 141.**

NATHANIEL GILMAN, *et. al.*
*PLAINTIFFS AND APPELLANTS.*
***vs.***
THE CITY OF PHILADELPHIA, *et. al.*,
*DEFENDANTS AND APPELLEES.*
} In Chancery.

## COMPLAINANTS' ARGUMENT.

INQUIRER PRINTING OFFICE.

1863

# SUPREME COURT OF THE UNITED STATES

**December Term, 1864. No. 141.**

NATHANIEL GILMAN, *et. al.*
*vs.*
THE CITY OF PHILADELPHIA, *et. al.* } In Chancery.

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## APPELLANTS' BRIEF AND ARGUMENT.

### STATEMENT OF CASE.

This cause came before the Circuit Court for the Eastern District of Pennsylvania, for final hearing upon bill and answer.

The main question being the same as that decided by Mr. Justice Grier at the previous term of the Court in the case of Milnor *vs.* the New Jersey Railroad Co., as to the bridge over the Passaic River; the case was therefore not argued in full, but the points were stated, and the learned Justice said that his opinion theretofore, expressed, was unchanged. The bill of Complainant was accordingly dismissed.

The complainants are the owners in fee simple of a lot of ground and wharf property at Philadelphia, upon the River Schuylkill. Philadelphia is a port of entry.

A commerce has been carried on upon said River Schuylkill to and from the said wharves for many years, in ships, brigs, schooners, and other water craft. The said River Schuylkill is navigable for vessels drawing eighteen to twenty feet of water.

The City of Philadelphia claiming under an Act of the State Legislature are about to erect a bridge across said river below the wharf property of complainants, without any draw, and of such a height as will obstruct the navigation of vessels to and from complainant's wharves, and thereby greatly injure and lessen the value of said property.

The complainant charges that the erection of a bridge at that point without suitable draws, would be an unlawful obstruction to the navigation of the river, and an illegal interference with his rights, and is a public nuisance, producing to him a special damage; that it is not competent for the Legislature of Pennsylvania to sanction such an erection, and that he is entitled to be protected by an injunction to stay further progress on the work, or to a decree of abatement, if it shall have been proceeded with to completion.

The defendant's answer admits the erection of the bridge complained of, justifies such erection under an Act of the Legislature of Pennsylvania, and alleges that other obstructions of a similar or greater extent have heretofore been placed across said stream at a higher point of the river, or beyond complainants' wharves, by virtue of other acts of said Legislature. The answer concedes that the bridge will prevent masted vessels from approaching to or unloading at the wharves of complainant, and insists that this is the only injury suffered by the complainant, and that the City of Philadelphia, the defendant, is able to respond in damages for such injury.

The answer further alleges that the proposed bridge is a necessity for public convenience.

Suits in Chancery had been brought by wharf owners in Newark, against the New Jersey Railroad, for constructing a bridge which would obstruct the navigation of that river. This case had been decided by Mr. Justice Grier, in the same circuit at a prior term, adversely to the plaintiffs, and the grounds for that decision were mutually understood by Court and Counsel to be the same for the dismissal of the bill in this case. It is therefore proper here to consider the position taken by the complainant in the former case, as well as the opinions of the Court therein.

The complainants in that suit alleged that the bridge would work a special injury to them by depreciating the value of their wharf property, and by causing inconvenience, delay and expense to vessels engaged in navigating the river.

They also contended that a special injury to the owners of property by an obstruction to navigation, entitled them to maintain a suit in equity for an injunction prior to the erection of the bridge or for a decree of abatement if the bridge should have been erected, and that that had been so decided in the case of the State of Pennsylvania *vs.* Wheeling Bridge, 13 Howard, page 562, to which, and to the authorities there collected, reference was made; that

the condition of complainants, so far as the ownership of wharf property is concerned, was almost identical with that of the State of Pennsylvania in the former case.

The learned Justice, in dismissing the bill, held :—

1. That the question whether the power to regulate bridges over navigable rivers wholly within the bounds of a State could be exercised by it below a port of entry, was not in the Wheeling Bridge case.—(Opinion, p. 9.)

2. That while Congress had exclusive power to regulate commerce, that has never been construed to include the means by which it is carried on.—(Opinion, p. ~~11.~~ 9

3. I see no reason (said the learned Justice) why the State, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves at the mouth of the river. It would affect the rights of no other State.—(Opinion, p. ~~13.~~) 10

4. The learned Justice said : "Assuming the right (which I neither affirm or deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the Courts cannot assume to themselves such power.—"(Opinion, p. ~~12.~~) 10

5. "The case of Wilson *vs.* the Blackbird Creek, &c , governs this, while it has *nothing* in common with that of the Wheeling Bridge. (Opinion, p. ~~13.~~) 11

As to these points of the learned Justice, it is submitted that the fact that Congress had, under the Constitution of the United States, regulated commerce upon the Ohio river by declaring Pittsburgh to be a port of entry, and by its acts for enrolling and licensing vessels, improving navigation, &c.; and that this was the main ground of that decision, appears from the judicial history of that case.

1. A supplemental bill was filed expressly setting up those points.—(13 How., 557.)

2. The grounds relied upon on argument by complainants' counsel.—(See 13 Howard, page 52.)

3. The clear, decided, and often repeated expressions on this point contained in the opinion of the Court.—(13 How., 561–563, 565, 566, 577, 578.) See post p.

4. By the opinion of the Chief Justice dissenting.—(13 How., 585.)

5. The grounds of the former decision of the Court were recited by Mr. Justice Nelson in another phase of the Wheeling Bridge case at December term, 1855.—(Reported, 18 Howard, 430.)

Under this view of the case then, it is proposed briefly to refer to certain views in support of the complainant's understanding of the opinion of the Court in the Wheeling Bridge case, and to sustain the position now assumed by complainant.

## I.

The river Schuylkill is a public navigable river, bounding the coasts of the United States, and Congress, by virtue of its power "to regulate commerce with foreign nations and among the several States," has asserted a certain jurisdiction in itself, and a certain right of navigation, or *jus publicum*, in the citizens of the United States in this and similar navigable rivers, and has regulated commerce in reference thereto:—

1. By establishing ports of entry and delivery for the citizens of the United States and other nations Congress has designated the ports on the coast or navigable rivers from or to which vessels engaged in certain branches of commerce may sail; and, incidentally, Congress has indicated the waters which may be used by the citizens of the United States or other nations in going to or from the designated ports.

Lord Hale in his de portibus maris, thus defines a port:—

"This kingdom is an island; and the ports of the kingdom are the gates, *ostia regni*, as well in reference to the exercise of trade as in reference to the safety and security of it against foreign enemies

And every public port is a franchise of liberty, as a market or a fair, and much more.

"For, 1st, it is a place of common resort of merchants and shipping, *arrivagium navium et batellorum*, within itself a franchise.

* * * * * *

(1st.) That no subject may institute or erect a common port without the charter of the king, or a lawful prescription; and, if he doth, the liberty or pretended liberty is seizable in a *quo warranto;* and the party that does is to be fined and to be adjudged, *quod omnia signa portus penitus amoveat.*

* * * * * *

(2) As a subject cannot erect a public port for all comers, so he cannot, without a lawful prescription or charter, erect a port for the men of such a fee or precinct as for his own tenants.

* * * * * *

(3d.) But yet farther, it seems that a subject cannot, neither

could by law at any time after customs were settled, arrive with customable goods and ship of his own at his own land, unless it had been a public port where the king's officers for the collecting of those customs were settled; for this were to defeat the king of his duty; and consequently it seems that not only the non-payment of the king's duties was punishable, but even the first application to his own port, whereby the king's officers were prevented not only of the duty, but of the means of discovery of it. * * * * p. 73.

2. The ownership of franchise. This is that which gives the formality or denomination of a public or lawful port, and becomes a free arrival of ships to lade and unlade their goods and merchandises; and this may be acquired by prescription, or by creation from the king either by proclamation or by charter.

And upon this account, though A may have the propriety of a creek, or harbor, or navigable river yet the king may grant there the liberty of a port to B, and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to A, for he hath what he had before, viz., the interest of the soil, and consequently the improvement of the shore and the liberty of fishing; and as the creek was free for any to pass in it against all but the king, for it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his license and charter makes it free for all to come and unlade. * * p. 53.

"A lord of a county palatine, though he may have and usually had ports by charter or prescription, yet he cannot erect a common port within his palatine jurisdiction. And the reason is because the concernment of a port must necessarily exceed the extent and limits of his jura regalia that are incident to a country palatine; for the safety of the kingdom, the commerce of the kingdom, and the king's revenue are concerned in it. Merchants and seamen of all parts and quarters of the world are let into the kingdom publicly, and under the public protection in a public port; and consequently it is not within the extent of a jurisdiction palatine *de novo* to erect a public port.

And now we have seen in whose power it is not to erect or create a port, it easily lets us see in whose power it is. It is a part of the *jus regale* or royalty of the crown of England originally and *de novo* to erect public ports in this kingdom."

Blundell *vs.* Catterall. Opinion of Holroyd, J. 5 B. and Ald 268.

"By the common law, all the king's subjects have in general a right of passage over the sea with their ships, boats, and other vessels, for the purposes of navigation, commerce, trade, and intercourse, *add also in navigable rivers.*"

"For the purpose of the king's subjects getting upon the sea and upon the navigable rivers, to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the king's prerogative, and called by Lord Hale the *ostia regni*, but also public places for embarking and landing themselves and their goods. It was not by common law, nor is it by statute, lawful to come with, or land or ship, customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity."

By the Constitution, the power to establish ports of entry, which by common law would have been in the several States was given up to Congress.

So Mr. Justice Nelson in the State of Pennsylvania *vs.* Wheeling and Belmont Bridge Co., 18 Howard 434, said—

"The power to establish their ports of entry and clearance by the States was given up and left to Congress. But the rights of the States were secured, by the exemption of vessels from the necessity of entering or paying duties in the ports of any State other than that to which they were bound, or to obtain a clearance from any port other than at the home port, or that from which they sailed.

So also Mr. Justice Washington, in the case Corfield *vs.* Corryell 4 Wash. C. C. R., 371.

"Commerce with foreign nations and among the several States, can mean nothing more than intercourse with those nations and among those States for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, *whether by the free navigation of the waters of the several States*, or by a passage over land through the States, where such passage becomes necessary to the commercial intercourse between the States. It is this intercourse which Congress is invested with the power of regulating, and with which no State has a right to interfere." * * * * *

"But if the power which Congress possesses to regulate commerce does not interfere with that of the State to regulate its internal trade, although the latter may remotely affect external commerce, except where the laws of the State may conflict with those of the general government; much less can that power impair the right of the

State governments to legislate in such manner as in their wisdom may seem best over the public property of the State, and to regulate the use of the same where such regulations do not interfere with the free navigation of *the waters of the State* for purposes of commercial intercourse, nor with the trade within the State, which the laws of the U. S. permit to be carried on."

"The grant to Congress to regulate commerce on the navigable rivers belonging to the several States, renders those waters the public property of the U. S., for all the purposes of navigation and commercial intercourse, subject only to congressional regulation But this grant contains no cession, either express or implied, of territory or of public or private property. The *jus privatum* which a State has in the soil covered by its waters is totally distinct from the *jus publicum* with which it is clothed. The former, such as fisheries of all descriptions, remains common to all the citizens of the State to which it belongs, to be used by them according to their necessities or according to the laws which regulate their use. 'Over these,' says Vattel (b. 1, 20, Sect. 235, 246,) 'sovereignty gives a right to the nation to make laws regulating the manner in which the common goods are to be used.' 'He may make such regulations respecting hunting and fishing, as to seasons, as he may think proper, prohibiting the use of certain nets and other destructive methods.' (Vattel, b. 1, c. 20, sec. 248.) The *jus publicum* consists in the right of all persons to use the navigable waters of the State for commerce, trade, and intercourse, subject by the Constitution of the United States to the exclusive regulation of Congress."

* * * * * *

"The act under consideration forbids the taking of oysters by any persons, whether citizens or not, at unseasonable times, and with destructive instruments, and for breaches of the law prescribes penalties in some cases, and forfeitures in others. *But the free use of the waters of the State for purposes of navigation and commercial intercourse is interdicted to no person; nor is the slightest restraint imposed upon any to buy and sell, or in any manner to trade, within the limits of the State.*"—(Ibid.)

2. Congress has enacted that the City of Philadelphia shall be made a port of entry.

Act March 2, 1799, 58, 1 Stat., 632.

3. Congress has granted coasting licenses, and attached certain privileges and duties thereto, which involve the use of navigable rivers extending from the ports to the open sea.

4. Congress has included in the designation, "coast of the United States," expressly, shores of "navigable rivers," as well as "sea coast," thus defining the term "coast."

"It is provided by Act, 2d March, 1819, sec. 1, 3 Stat. 492, that—

"For the more convenient regulation of coasting trade, the sea-coast and navigable rivers of the United States be, and hereafter are, divided into two great districts; the first to include all the districts on the sea-coast and navigable rivers between the eastern limits of the United States and the southern limits of Georgia; and the second to include all the districts on the sea-coast and navigable rivers between the River Perdito and the western limits of the United States."

By section 2, that—

"Every ship, or vessel, of the burden of twenty tons or upwards, licensed to trade between the different districts of the United States, shall be and is hereby authorized to carry on such trade between the districts included within the aforesaid great districts respectively, and between a State in one and an adjoining State in another great district, in manner and subject only to the regulations that are now by law required to be observed by such ships or vessels, in trading from one district to another, in the same State, or from a district in one State to a district in the next adjoining State, anything in any law to the contrary notwithstanding."

By Act, 18th February, 1793, sec. 14, 1 Stat. 309, that—

"The master or commander of every ship or vessel licensed for carrying on the coasting trade, destined from a district in one State to a district in the same or an adjoining State on the sea-coast or on a navigable river, having on board either distilled spirits, in casks, exceeding five hundred gallons; wine, in casks, exceeding two hundred and fifty gallons, or in bottles, exceeding one hundred dozens."

By sec. 15, that—

"The master or commander of every ship or vessel licensed for carrying on the coasting trade, having on board either distilled spirits, in casks, exceeding five hundred gallons; wine, in casks, exceeding two hundred and fifty gallons, or in bottles, exceeding one hundred dozens; * * * and arriving from a district in one State at a district in the same, or an adjoining State *on the sea-coast on a navigable river*, shall, previous to the unlading of any part of the cargo of such ships or vessels, deliver to the collector,

if there be one, or, if not, to the surveyor residing at the port of her arrival."

By sec. 16, that—

"The master or commander of every ship or vessel licensed for carrying on the coasting trade, and being destined from any district of the United States to the district other than a district in the same or an adjoining State on the sea-coast or on a navigable river, shall, previous to her departure, deliver to the collector residing at the port where such ship or vessel may be."

By sec. 17, that—

"The master or commander of every ship or vessel licensed to carry on the coasting trade, *arriving* at any district of the United States from any district other than a district in the same, or an adjoining State on the sea-coast, or on a navigable river, shall deliver to the collector residing at the port where she may arrive, if there be one, otherwise to the collector or surveyor in the district comprehending such port." * * * * * * *

By sec. 18, that—

"Nothing in this act shall be so construed as to oblige the master or commander of any ship or vessel, licensed for carrying on the coasting trade, bound from a district in one State to a district in the same, or an adjoining State, on the sea-coast, or on a navigable river."

And by Act 7 May, 1822; sec. 11, 3 Stat. 685, that—

"The first section of an act passed on the 2d day of March, 1819, entitled "An act supplementary to the acts concerning the coasting trade," be so far amended and altered that the sea-coasts and navigable rivers of the United States be, and the same are hereby divided into three great districts, the first and second to be and remain as therein described, and the third to include all the ports, harbors, sea-coasts, and navigable rivers between the southern limits of Georgia and the river Perdido; and the said third great district so established shall be subject to all the regulations and provisions of said act."

Mr. C. J. Marshall, in Gibbons *vs.* Ogden, 9 Wheaton, 212, said—

"To the court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to liscensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a liscense in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment, that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. *To construe these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act.*

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license to carry on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature, and *convey as explicitly the authority the act intended to give, and operate as effectually as if they had been inserted in any other part of the act, than in the license itself.*

The word "license" means permission, or authority, and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it transfers to the grantee to the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be—a legislative authority to the steamboat Bellona, "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true, that no ports are specified; but it is equally true, that the words used are perfectly intelligable, and do confer such authority as unquestionably, as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York is one of those operations."

5. Congress has attached certain duties and privileges to foreign vessels, and to vessels trading with foreign countries, or in foreign articles, by treaty and by legislation.

(See authorities collected under the last head.)

Act 2 March, 1799; sec. 38, 1 Stat., 658, provides that—

"All distilled spirits, wines, and teas shall be landed under the inspection of the surveyor or other officer acting as inspector of the revenue for the port, and such of the inspectors of the customs as shall be deputed by him for that purpose, and not otherwise, on pain of forfeiture thereof; for which purpose the said officer or officers shall at all reasonable times attend: Provided that this shall not be construed to exclude the inspection of any officer of the customs as now heretofore practised."

Sec. 39, provides that—

"The officers of inspection of any port where distilled spirits, wines, or teas shall be landed, shall, upon the landing thereof, and as soon as the casks, chests, vessels, and cases containing the same shall be inspected, gauged, or measured."

By act 20 July, 1790; sec. 2, 1 Stat., 135, it is provided that—

"The aforesaid duty of six cents per ton shall be also paid upon every ship or vessel of the United States which, after the said first day of September next, shall be entered in a district in one State from a district in another State other than an adjoining State on the sea-coast, or *on a navigable river*, having on board goods, wares, and merchandise taken in one State to be delivered in another State: Provided that it shall not be paid on any ship or vessel having a license to trade between the different districts of the United States, or to carry on the bank or whale fisheries, whilst employed therein, more than once a year.

Act 1 March, 1817; sec. 5, 3 Stat., 351 provides that—

"After the 30th day of September next, there shall be paid a duty of fifty cents per ton upon every ship or vessel of the United States, which shall be entered in a district in one State from a district in another State, except it be an adjoining State on the sea-coast, *or on a navigable river or lake.*" * * *

Act 1 March, 1817; sec. 4, 3 Stat., 351, provides that—

"No goods, wares, or merchandise shall be imported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power; but this clause shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no goods, wares, or merchandise, other than those imported in such vessel from some foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States."

Act 2 March, 1799; sec. 104, 1 Stat., 655, provides that—

"For the purpose of conforming this act to certain stipulations contained in treaties made and ratified under the authority of the United States, it is hereby declared that it shall at all times be free to British subjects, and also to the Indians dwelling on either side of the boundary line of the United States, as settled by the treaty of peace, freely to pass and repass, by land or inland navigation, into and from the territories of the United States, and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with the citizens of the United States: *Provided* that nothing herein contained shall be construed to justify the admission of British vessels from the sea *into the rivers of the United States*, beyond the highest *ports of entry for foreign vessels from the sea;* and all goods and merchandise, the importation of which into the United States shall not be wholly prohibited, shall and may freely, for the purpose of commerce, be brought into the same in manner aforesaid, by British subjects from the territories of the King of Great Britain in America."

6. Congress has expended money in surveying, sounding, and charting navigable rivers extending from the sea to ports of entry.

By act 10 Feb., 1807; sec. 1, 2 Stat., 413, it is provided that—

"The President of the United States shall be, and he is hereby authorized and requested to cause a survey to be taken of

the *coasts* of the United States, in which shall be designated the islands and shoals, with the roads or places of anchorage, within twenty leagues of any part of the shores of the United States, as also the respective courses and distances between the principal capes or headlands, together with such other matters as he may deem proper for completing an accurate chart of every part of the coasts within the extent aforesaid."

From the official archives of the Coast Survey, the aggregate of the shore line of the coast of the United States, washed by the sea, in the States bordering on the Atlantic and Gulf of Mexico, is 3802 miles. The shore lines of bays, 15,049 miles; of rivers to the head of tide, 14,286 miles.

The aggregate amount of coast and rivers surveyed, has been 32,400 miles.

It will thus be seen that the amount of river coast, extending to the ebb and flow of the tide, is very nearly one-half of the whole coast of the United States.

The amount expended by various appropriations of Congress, to survey the coast of these bays and rivers, appears by the Report of the Secretary of the Treasury, Executive Document No. 6, to have been $4,600,261.09.

7. Congress has expended money in clearing out and improving the channels of rivers between the sea and ports of entry, by constructing breakwaters, buoys in the channels to guide the mariner by day, and light-houses to guide him by night.

The aggregate amount expended, as appears by the appropriations of Congress Statutes at Large, in the Atlantic States, for improvements, including dredging the channels, the erection of breakwaters, buoys, and light-houses, is $13,868,980. In providing suitable means for the defence of these harbors, government have expended $18,358,960. (See Appendix, p. —.)

8. Congress has established custom-houses, warehouses, scales, etc., at ports of entry, and established collectors, surveyors, appraisers, and other officers thereat.

In U. S. Statute, 2 March, 1790, § 21, it is provided that—

"The several officers of the custom shall respectively perform the duties following, to wit: at such of the ports to which there shall be appointed a collector, naval officer, and surveyor, the collector shall receive all reports, manifests, and documents to be made or exhibited on the entry of any ship or vessel according to

the regulations of this act; shall record in books to be kept for that purpose all manifests; shall receive the entries of all ships or vessels, and of the goods, wares, and merchandise imported in them; shall, together with the naval officer, where there is one, or alone, where there is none, estimate the amount of the duties payable thereupon, indorsing the said amount upon the respective entries; shall receive all moneys paid for duties, and take all bonds for securing the payment thereof; shall grant all permits for the unlading and delivery of goods; shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers, and inspectors, at the several ports within his district, and also, with the like approbation, provide, at the public expense, storehouses for the safe keeping of goods, and such scales, weights, and measures, as may be necessary."

In case of Tremlett *v.* Adams, 13 Howard, 304, Mr. Justice Taney said:—

"There could, therefore, but rarely be any necessity for public stores or warehouses at a port of delivery, before the passage of the Warehousing Act.

*It was otherwise at ports of entry.* The importer himself had no right to land them even at a port of entry before the duties were paid. But when the entry at the custom-house was imperfect, for want of the proper documents, or where the goods were damaged in the voyage, and the duties could not be immediately ascertained; or the cash duties were not paid after the forms of entry had been complied with, in all of these cases, the *collector was directed* by existing laws to take possession of such goods, and place them in *public stores*, and *retain them until the duties were paid.* And as all of this *was to be done at the port of entry, public stores were necessary at such ports*, and they had accordingly been provided for by law, before the passage of the Warehousing Act.

9. Congress, in establishing these places as ports, constituted them sea-marts, at which trade between foreign nations and other States should be carried on; and this was done with a view to the best interests of the citizens of the whole United States, not of the citizens of the particular town or State."

Lord Hale, in his *de portibus maris*, Hargrave's Tracts, p. 72, said:—

"Having now considered the original of seaports, I come to the several rights that are to be found, and observed, and carefully distinguished, in the consideration of public seaports.

In all public seaports in England, there are three kinds of rights that meet, and though they are distinct, one from another, yet they consist, one with another, whether the ports belong in point of franchise or propriety to the king or to a subject.

I. *Jus privatum*, interest of propriety or franchise.

II. *Jus publicum*, the common interest that all persons have to resort to or from public seaports, as public seamarts or markets, with their goods, and wares, and merchandises.

III. *Jus regium*, or the right of superintendency and prerogative that the king hath for the safety of the realm, or benefit of commerce, or security of his customs."

The same view is expressed by Mr. Justice Catron, in the Passenger cases, 7 Howard, 450.

Passenger cases, Mr. Justice Catron's opinion, 7 Howard, 452.

"Provision had to be made for foreign commerce coming from Europe and other quarters by navigation in pursuit of profitable merchandise and trade, and also to regulate personal intercourse among aliens coming to our shores by navigation in pursuit of trade and merchandise, as well as for the comfort and protection of visitors and travellers coming in by the ocean.

* * * * * *

* * * "Therefore all power to treat or have foreign intercourse was surrendered by the States, and so were the powers to make war and to naturalize aliens given up. These were vested in the general Government for the benefit of the whole. This became "the nation" known to foreign Governments, and was solely responsible to them for the acts of all the States and their inhabitants.

The general Government has the sole power by treaty to regulate that foreign commerce which consists in navigation, and in buying and selling. *To carry on this commerce, men must enter the United States (whose territory is a unit to this end) by the authority of the nation*; and what may be done in this respect will abundantly appear by what has been done from our first administration under the Constitution to the present time, without opposition from State authority, and without being questioned, except by a barren and inconsistent theory, that admits exclusive power in the general Government to *let in ships and goods*, but denies authority to let in the men who navigate the vessels, and those who come to sell the goods and purchase our productions in return."

So Mr. Justice Grier, in the same cases, 7 Howard, 461, says:—

"A right to exclude is a power to tax; and the converse of the position is also true, that a power to tax is a power to exclude; and it follows as a necessary result, from this doctrine, that those States in which are situated the great ports or gates of commerce have a right to exclude, if they see fit, all immigrants from access to the interior States, and to prescribe the conditions on which they shall be allowed to proceed on their journey, whether it be the payment of two or of two hundred dollars. Twelve States of this Union are without a seaport. The United States have within and beyond the limits of these States many millions of acres of vacant lands."

* * * * * * *

"Besides, if a State may exercise this right of taxation or exclusion on a foreigner, on the pretext that he may become a pauper, the same doctrine will apply to citizens of other States of this Union; and thus the citizens of the interior States, who have no ports on the ocean, may be made tributary to those who hold the gates of exit and entrance to commerce." * * *

Ibid., 462.

If these States still retain all the rights of sovereignty, as this argument assumes, one of the chief objects for which this Union was formed has totally failed, and "we may again witness the scene of conflicting commercial regulations and exactions which were once so destructive to the harmony of the States, and fatal to their commercial interests abroad."

Ibid., 463.

"For, if a State has an absolute right to tax vessels and persons coming from foreign ports, or those of other States, before they reach the shore, and as a condition for license to land in her ports, she may tax to any amount, and neither Congress nor this court can restrain her in the exercise of that right; it follows, also, as a necessary consequence, *that she may* exclude all vessels but her own from entering her ports, and may grant monopolis of the navigation of her bays and rivers." * * *

Ibid., 464.

"3d. That the power to tax this intercourse necessarily challenges the right to exclude it altogether, and thus to thwart the policy of the other States and the Union.

10. Lastly, Congress has regulated navigation on the Schuykill,

by willing that "Commerce shall be free," and by its negative action in not imposing restraints, or authorizing the several States to do so.

In the passenger cases, Mr Justice Grier, 7 How., 464, said—

"4th. That Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free; and it is therefore not left to the discretion of each State in the Union either to refuse a *right of passage to persons or property through her territory*, or to exact a duty for permission to exercise it."

In the same cases Mr. Justice McLean said—

Passenger Cases—Mr. Justice McLean's opinion, 7 Howard, 399.

"It has been well remarked, that the regulation of commerce consists as much in negative as in positive action. There is not a federal power which has been exerted in all its diversified means of operation. And yet it may have been exercised by Congress influenced by a judicious policy and the instruction of the people. Is a commercial regulation open to State action because the federal power has not been exhaused?"

II. The "navigable rivers" in which the tide ebbs and flows, which connect the ocean with the ports of the United States, were held to be arms of the sea, by the common law, at the time of the adoption of the Constitution; and to such rivers, therefore, the *jus publicum* of the citizens of the United States was attached, by reason of this fact, in the same manner as it attached to the high sea.

Lord Hale, in his *de portibus maris*, Hargrave's Tracts, page 12, says—

"2. For the second, that is called an arm of the sea, where the sea flows and reflows, and so far only as the sea so flows and reflows, so that the river of Thames above Kingston, and the river of Severn above Tewkesbury, &c., though, there they are public rivers, yet are not arms of the sea. But it seems that, although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in Thames above the bridge."

Mr. Chief Justice Taney in the case of the Propellor Genesse Chief et al. *vs.* Fitzhugh et al., 12 Howard, 454, said—

"In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide water. And this definition in Eng-

land was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contra-distinguished from private ones; and they took the ebb and flow of the tide as the test because it was a convenient one and more easily determined the character of the river. Hence the established doctrine in England that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

At the time the Constitution of the United States was adopted, and our Courts of Admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States, the far greater part of navigable waters are tide waters. And in the States which were at that period in any degree commercial, and where Courts of Admiralty were called on to exercise their jurisdiction, every public river was tide-water to the head of navigation."

In this particular, the Ohio river differed at common law, and hence the Act of Virginia, providing for the erection of Kentucky into a State, of 1789. The effect of the compact between Virginia and Kentucky was to place the Ohio on the same footing as the tidal rivers of the old States.

At the time of the passage of the ordinance of 1789, Congress, in asserting its jurisdiction over the river Ohio, had stopped at the falls at Louisville, and established no commercial district above Louisville.

Act of Congress, July 31, 1789, provided that—

"For the District of Louisville a collector shall be appointed to reside thereat, whose authority shall extend over all waters, shores, and inlets included between the rapids and the mouth of the Ohio river, on the southeast side thereof."

On the 18th of December, 1789, at the time the Act of Virginia passed for the erection of Kentucky into a State, the river Ohio, which washed the shores of Kentucky and Virginia (inasmuch as it had been in no way regulated by Congress,) may well have been considered exclusively within State jurisdiction. The act of Vir-

ginia at the time she parted with her jurisdiction of so much of that river, as washed the shore of Kentucky, was a wise and provident measure.

"That the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States—" (*Virginia Rev. Code*, 1819, p. 59.)

The effect of the legislative compact of Kentucky was to put the river Ohio upon the same footing as far as the citizens of the United States were concerned, as the tidal rivers of the old States, upon which Congress had, in the month of July preceding, asserted jurisdiction, and the jurisdiction of Virginia and Kentucky over the Ohio under this compact of 1789, was the same as the jurisdiction of the old States over the tidal rivers within their limits.

This was decided in the case of City of Mobile *vs.* Eslava, 16 Peters, 252.

"When the Alabama territory, in 1819, proposed to form a State Government, Congress passed an act (ch. 171) to authorize the formation of a State Constitution; and proposed several conditions for the adoption of the Convention, which were adopted as part of the Constitution; and amongst others, it was agreed with the United States."

* * * * * * * *

"2. That all the navigable waters within the State shall forever remain public highways, and free to the citizens of that State, and the United States, without any tax, duty, or impost, or toll therefor, imposed by that State."

The Constitution of Alabama was presented to Congress for recognition; and on the 14th of December, 1819, it was resolved "That the State of Alabama shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever.

* * * * * * * *

p. 254.

"The Constitution of the United States provides, 'That Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any

particular State.' This is the paramount law of the land, by force of which the public domain in Alabama was held and governed, and which needed no aid.

Neither did Congress cede it by stipulating that the navigable rivers should be highways. *That such waters are common* for the purposes of *navigation and commerce*, in the widest sense, is free from doubt; that Alabama has jurisdiction and power over them, the same as the original States have over their navigable waters, is equally clear."

In Pollard's Lessee *v.* Hagan, et. al. 3 How. 228, it was held that—

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compacts to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England, as it prevailed in the Colonies before the Revolution, but as modified by our own institutions. In the case of Martin and others *v.* Waddell, 16 Peters, 410, the present Chief Justice, in delivering the opinion of the Court, said: 'When the Revolution took place, the people of each State became themselves sovereigns, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution.' Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."

* * * * * * *

p. 230.

"For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States," and laws which shall be made in pursuance thereof.

"By the preceding course of reasoning, we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively.

Secondly, The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States."

See, also, dissenting opinion of Mr. Chief Justice Taney in Wheeling Bridge Case, 13 Howard, 585.

In reply to the argument that the decision on the Wheeling Bridge Case, 13 Howard, 585.

In reply to the argument that the decision on the Wheeling Bridge Case proceeded upon the doctrine of international law, that a supra-riparian nation or State has a right to the free navigation of a river flowing through another nation or State, it may be observed that the opinion on the Wheeling Bridge Case in no way mentions this doctrine as a ground of decision, and such right of a supra-riparian nation or State, has always been treated by the writers on international law as an imperfect right, and in almost every case the right is determined by specific treaty.

Wheaton, International Law, 254.

III. The commerce which begins or ends at the United States ports located on these arms of the sea, or navigable rivers, and which is carried on between foreign nations and the several States, is wholly independent of State jurisdictional lines.

Gibbons *vs.* Ogden, 9 Wheaton, 194.

"The subject to which the power is next applied is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

* * * * * * * *

"But in regulating commerce with foreign nations the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. *The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right.* If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State."

Mr. Justice Wayne, in Passenger Cases, 7 How., 414, said:—

"8. That the power in Congress to regulate commerce with foreign nations and among the several States includes navigation upon the high seas, aad in the bays, harbors, lakes, and navigaole waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right *to a condition*, is contrary to the aforesaid grant."

In the same cases, Mr. Justice Catron, 7. How., 444, said:—

"By the fourteenth article of the treaty of 1794 (known as Jay's treaty) and which article was renewed by our treaty with Great Britain of 1815, it was stipulated that reciprocal liberty of commerce should exist between the United States and all the British territories in Europe: "That the inhabitants of Great Britain shall have liberty freely and securely to come with their ships and cargoes to our ports, to enter the same, and to remain and reside in any part of our territories; also to hire and occupy houses and warehouses for the purposes of their commerce."

* * * * * * *

Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the Confederation, and forming the Constitution—more than all other causes, it led to the result; and the provision, prohibiting the States from laying any duty on imports or exports, and the one which declares that vessels bound to, or from, one State, shall not be obliged to enter, clear, or pay duties in another, were especially intended to prevent the evil. Around our extensive seaboard, on our great lakes, and through our great rivers, this protection is relied on against State assumption and State interference. Throughout the Union, our vessels, of every description, go free and unrestrained, regardless of State authority. They enter at pleasure, depart at pleasure, and pay no duties. Steamboats pass for thousands of miles on rivers that are State boundaries, not knowing nor regarding in whose jurisdiction they are, claiming protection under these provisions of the Constitution."

* * * * * *

"The Constitution is a practical instrument, made by practical men, and suited to the territory and circumstances on which it was intended to operate. To comprehend its whole scope, the mind must take in the entire country and its local governments. There were, at the time of its adoption, thirteen States. There

existed a large territory beyond them already ceded by Virginia, and other territory beyond them already ceded by North Carolina and Georgia. New States were in contemplation, far off from ports on the ocean, through which ports aliens must come to our vacant territories and new States, and through these ports foreign commerce must of necessity be carried on by our inland population.

* * * * * *

"To carry on this commerce, men must enter the United States (whose territory is a unit to this end), by the authority of the nation; and what may be done in this respect, will abundantly appear by what has been done from our first administration, under the Constitution, to the present time, without opposition from State authority, and without being questioned, except by a barren and inconsistent theory, that admits exclusive power in the general government to let in ships and goods, but denies its authority to let in the men who navigate the vessels, and those who come to sell the goods and purchase our productions in return."

IV. In view of the foregoing congressional action, no State can interfere with the free navigation of any "navigable river," or arm of the sea, leading from the high sea to any declared port of the United States, by interfering with either of the essentials required in navigating said waters, viz: the vessel, the impelling agent, the water, or the navigators.

V. The citizens of the United States, and of foreign nations, having thus, under the Constitution and acts of Congress, acquired a right to navigate the river Passaic to and from the port of the town of Newark, an obstruction to such navigation, under the act of State Legislature, is unconstitutional and a public nuisance that may be enjoined or abated on complaint of an injured party.

VI. It is immaterial whether the building of a bridge across a navigable river, in pursuance of State legislature, is appropriately denominated a municipal regulation, a police regulation, or a regulation of commerce. The only question to be now discussed is, whether the bridge so built, under authority of a State legislature, would, as a matter of fact, interfere with the exercise of a jus publicum recognized in a citizen of the United States by Congress, or any jurisdiction that has been assumed or asserted by Congress over such a navigable river of the United States, or any regulation of commerce in reference thereto.

Mr. Justice Marshall, in Gibbons *vs.* Ogden, 9 Wheaton 209, said:—

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be *immaterial whether those laws* were passed in virtue of a concurrent power "to regulute commerce with foreign nations and among the several States," or *in virtue of a power to regulate their domestic trade and police.* In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

Acts of 25 Feb., 1799. § 1, 1 Stat. 619, provides that—

"The quarantines and other restraints, which shall be required and established by the health laws of any State, or pursuant thereto, respecting any vessels arriving in or bound to any port or district thereof, whether from a foreign port or place, or from another district of the United States, shall be duly observed by the collectors and all other officers of the revenue of the United States, appointed and employed for the several collection districts of such State respectively, and by the masters and crews of the several revenue cutters, and by the military officers who shall command in any fort or station upon the sea-coast; and all such officers of the United States shall be, and they hereby are authorized and required, faithfully to aid in the execution of such quarantines and health laws, according to their respective powers and precincts, and as they shall be directed from time to time by the Secretary of the Treasury of the United States. And the said secretary shall be, and he is hereby authorized, when a conformity to such quarantines and health laws shall require it, and in respect to vessels which shall be subject thereto, to prolong the terms limited for the entry of the same, and the report or entry of their cargoes, and to vary or dispense with any other regulations applicable to such reports or entries. *Provided,* That nothing herein shall enable any State to collect a duty of tonnage or impost without the consent of the Congress of the United States. *And provided* that no part of the cargo of any vessel shall in any case be taken out

or unladen therefrom, otherwise than as by law is allowed, or according to the regulations hereinafter established.

Section 2.

When by the health laws of any State, or by the regulations which shall be made pursuant thereto, any vessel arriving within a collection district of such State, shall be prohibited from coming to the port of entry or delivery, by law established for such district, and it shall be required or permitted by such health laws, that the cargo of such vessel shall or may be unladen at some other place within or near to such district, the collector authorized therein, after due report to him of the whole of such cargo, may grant his especial warrant or permit for the unlading and discharge thereof, under the care of the surveyor or of one or more inspectors, at some other place where such health laws shall permit, and upon the conditions and restrictions which shall be directed by the Secretary of the Treasury, or which such collector may for the time reasonably judge expedient for the security of the public revenue. *Provided*, that in every such case all the articles of the cargo so to be unladen, shall be deposited at the risk of the parties concerned therein, in such public or other warehouses or enclosures as the collector shall designate, there to remain under the joint custody of such collector, and of the owner or owners, or master or other person having charge of such vessel, until the same shall be entirely unladen or discharged; and until the goods, wares or merchandise which shall be so deposited may be safely removed without contravening such health laws. And when such removal may be allowed, the collector having charge of such goods, wares, or merchandise, may grant permits to the respective owners or consignees, their factors or agents, to receive all goods, wares or merchandise which shall be entered, and whereof the duties accruing shall be paid or secured according to law, upon the payment by them of a reasonable rate of storage, which shall be fixed by the Secretary of the Treasury for all public warehouses and enclosures.

Section 13.

There shall be purchased or erected under the orders of the President of the United States, suitable warehouses with wharves and enclosures, where goods and merchandise may be unladen and deposited from any vessel which shall be subject to a quarantine, or other restraint, pursuant to the health laws of any State as aforesaid, at such convenient place or places therein as the safety

of the public revenue and the observance of such health laws may require."

VII. The equitable powers of the Court of the United States are adequate to grant relief, either by injunction or decree of abatement, at the suit of an injured party.

Mr. Justice McLean in Penna. *vs.* Wheeling Bridge Co., 13 Howard, page 567, says—

In 3 Mylne and Keen, 169, Lord Brougham says: "If the thing sought to be prohibited is, in itself, a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action," &c. Lord Eldon, in the case of Attorney-General *vs.* Cleaver, appeared to think that there was no instance of an injunction to restrain a nuisance without trial. But in this he was clearly wrong.

The fact that the bridge constitutes a nuisance is ascertained by measurement. The height of the bridge, of the water, and of the chimneys of the steamboats, are the principal facts to be ascertained. If the obstruction exists, it is a nuisance. To ascertain this, a jury is not necessary. It is shown in the report by a mathematical demonstration. And the other matters connected with the case, as to the benefit of high chimneys, lowering of them in passing under the bridge, and shortening chimneys, are matters of science and experience, better ascertained by a report than a verdict. And the same may be said of the statistics which are in the case.

* * * * * *

That the bridge constitutes an obstruction is shown by the report of the Commissioner, the answer of defendants, the proof in the case, and by the admission in the argument of the counsel for the defendants. The report of the Commissioner is considered, as to the fact of the obstruction and the extent of it, of the same force as a verdict of a jury. The report having been the result of a most arduous and scientific investigation of the facts, is entitled to the full weight of a verdict.

Wheeling Bridge Case, 13 Howard.

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An indictment at common law could not be sustained in the Federal Courts by the United States against the bridge as a nuisance, as no such procedure has been authorized by Congress. But

a proceeding on the ground of a private and irreparable injury may be sustained against it (the bridge), by an individual or a corporation. Such a proceeding is common to the Federal Courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party, and the doctrine of nuisance applies to the case, where the jurisdiction is made out, the same as in a public prosecution.

* * * * * *

The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the State of Virginia.

VIII. That the Courts of the United States, in exercising this power, may enjoin absolutely against the erection of any bridge across "a navigable river," or decree an absolute abatement, or may grant a conditional injunction against particular form or extent of obstruction; that courts of the United States can take cognizance of, and determine the alleged fact and extent of nuisance, or can refer the same to a master or to a jury.

See other authorities under last head.

Pennsylvania *vs.* Wheeling Bridge Co., 13 Howard, 518.

Devoe *vs.* Penrose Ferry Bridge Co., 3 Law Reg. 80.

The present case is within the principle decided in the case of Pennsylvania *vs.* Wheeling Bridge, and unlike the Blackbird Creek Case.

The Blackbird Creek is one of those small sluggish streams of which there are many thousand on the coast. It was not at common law a public navigable river. C. J. Marshall did not hint at any distinction in that case as to *rivers* which were wholly within a single State; he merely said in small sluggish creeks. Congress had in no way regulated commerce on such a creek. There was no port of entry on it, no charting or sounding of it, no improvements on it. And in view of this the plaintiff in error placed his whole case on the conflict between the Act of the Legislature of Delaware, and the power vested by the Constitution in Congress, which was admitted by him to have never been exercised over that creek. This creek was like the cases in King *vs.* Montague, 4 B. & C. 58; and Rowe *vs.* Granite Bridge Co., 21 Pick. 344. Even if

the Blackbird Creek Company had constructed the dam without an Act of the Delaware Legislature, it would have been questionable if in the State Courts of Delaware such a construction would have been held to be a nuisance. In the argument of the case, reliance was placed on behalf of the dam only upon the case 4 in Barn. & Cress, which was such a stream as was held in England could be stopped up without an Act of Parliament.

See Angell on Waters; also 4 Barn. & Cress, p. 602. See also Comments of Court on Case of Blackbird Creek, 13. How. 566.

GEORGE HARDING,
*Counsel for the Appellants.*

# SUPREME COURT OF THE UNITED STATES

**DECEMBER TERM, 1864. No. 141.**

NATHANIEL GILMAN, *et. al.*,
*PLAINTIFFS AND APPELLANTS.*

*vs.*

THE CITY OF PHILADELPHIA, *et. al.*,
*DEFENDANTS AND APPELLEES.*

In Chancery.

**SUPPLEMENT TO**

## COMPLAINANTS' ARGUMENT.

1335

# SUPPLEMENT TO COMPLAINANT'S BRIEF.

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*Extracts from Opinion of Court, per Mr. Justice McLean in Wheeling Bridge Case.*

13 How., p. 561.

That the Ohio River is navigable is a historical fact, which all courts may recognize. For many years the commerce upon it has been regulated by Congress, under the commercial power, by establishing ports, requiring vessels which navigate it to take out licenses, and to observe certain rules for the safety of their passengers and cargoes. Appropriations by Congress have been frequently made, to remove obstructions to navigation from its channel.

Ibid., p. 564.

"The Ohio being a navigable stream, subject to the commercial power of Congress, and over which that power has been exerted; if the river be within the State of Virginia, *the commerce upon it, which extends to other States, is not within its jurisdiction*—consequently, if the act of Virginia authorized the structure of the bridge so as to obstruct navigation, it could afford no justification to the bridge company." * * * * * *

Ibid., 565.

Congress have not declared in terms that a State, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio; but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other of boats, and inflicting severe penalties for neglect of those duties by which damage to life or property has resulted. * * * * *

Ibid., 566.

"Congress has led in regulating commerce on the Ohio, which brings the case within the rule above laid down. * * *

Ibid., 566.

"No State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. * * * * * * * * But a public nuisance is also a private nuisance, where a special and irremediable mischief is done to an individual."—Ibid., 566.

Ibid., 578.

"It is true the injury done to the State of Pennsylvania may seem to be small when compared to the magnitude of this subject. *It applies to all our rivers*, and affects annually a transportation of many millions of passengers, and a commerce worth not less than six hundred millions of dollars. It would be as unwise as it is unlawful to fetter, in any respect, this vast commerce.

In same case, 18 How. 430, Mr. Justice Nelson, referring to former decision, said—

"The bridge had been constructed under an act of the legislature of the State of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce. It was claimed, however, that Congress had acted upon the subject and had regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were paramount law.

"This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion, that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the constitution and laws of Congress, nor in applying the appropriate remedy in behalf

of the plaintiff. The ground and principles upon which the court proceeded will be found reported in 13 How., 518.

*Gibbons vs. Ogden*, 9 *Wheaton*, 239. *Extract from the decree of the Court:—*

"This cause came on to be heard on the transcript of the record of the court for the trial of impeachments and corrections of errors of the State of New York, and was argued by counsel. On consideration whereof, this court is of opinion, that the several licenses to the steamboats, the Stoudinger and the Bellona, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New York, which were granted under an act of Congress, passed in pursuance of the Constitution of the United States, gave full authority to those vessels to navigate the *waters of the United States*, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding; and that so much of the several laws of the State of New York, as prohibits vessels licensed according to the laws of the United States from navigating *the waters of the State of New York*, by means of fire or steam, is repugnant to the said constitution, and void."

Devoe et als. *vs.* Penrose Ferry Co., opinion per Mr. Justice Grier, 3 Am. Law Reg., 81.

A very large number of witnesses have been examined in support and denial of the charges of these bills. The usual practice of this court, on motions for special injunctions, has been to grant them as a matter of course, where no opposition is made by defendants, on affidavits supporting the charges of the bill. And in patent cases, if the defendant denies, under oath, the equity of the bill, the court will usually inquire no further, and will not proceed, on a mere preliminary motion and affidavit, to try the whole merits of the case.

P. 83.

"But in applications for an injunction, in case of alleged nuisance, the practice has been somewhat different. In such cases, it is not sufficient to deny the law, or the facts relied on in the bill, to have the injunction refused, and the inquiry will be, whether it is not best for all parties that the erection of the supposed nuisance should be arrested till these questions be finally and properly decided. And if no irreparable or very material injury will probably arise

to the defendant, the Court will issue the injunction without attempting to adjudicate the merits by anticipation. It is usually better for all parties that an injunction issue even in a doubtful case, till the merits of the controversy are finally decided.

It has been my desire to pursue this course in the present case, and to have silently granted the injunctions, without forming or expressing any opinion on the merits, or the great questions of law and fact involved in the case. But, as the counsel have argued the case very fully on its merits, and as I find that illegitimate inferences have been drawn, and unnecessary fears excited, as to the results and consequences of certain doctrines supposed to be held by the Court on the subject, I have concluded to briefly express an opinion upon the leading questions of law and fact in the case, notwithstanding it may appear to be in anticipation of the final hearing of the merits.

As the defendants in this case claim to act under the authority of the State of Pennsylvania in the erection of this bridge, which it is charged will be a nuisance to the navigation of the river Schuylkill, the right or propriety of the interference of this Court becomes a matter of grave and serious consideration.

The river Schuylkill is wholly within the territory of the State. She has exercised jurisdiction over its waters both as a State and a colony. She has authorized the erection of a dam and three bridges below the ebb and flow of the tide. States have an undoubted right to regulate all matters of police, including internal commerce, roads, ferries, canals and bridges. But the power conferred on the general government by the Constitution of the Union, to regulate commerce between the several States and foreign countries, necessarily authorize it to keep open and free all navigable streams connecting the ocean with ports of delivery or entry, and protect the intercourse between the several States on all our tide-waters. When the exercise of their several powers come into conflict, those of the State must necessarily yield to the superior or controlling power. The jurisdiction of this Court in cases like the present, has been fully considered and decided by the Supreme Court in the case of *The State of Pennsylvania* vs. *The Wheeling Bridge*, 13 How. 519. This Court is not at liberty, even if so disposed, to disregard the authority of that case, and the people of Pennsylvania, at whose instance the doctrines contained in it were established, are morally estopped from questioning their correctness. It is there decided that, although the Courts of the United States cannot punish by

indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that as Courts of Chancery they may interfere at the instance of an individual or corporation, who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to ports of entry within a State.

The commerce on the river Schuylkill below the port of Philadelphia, is as much entitled to this protection as that of the Ohio, Mississippi, Delaware, or Hudson; and the complainants in this case have shown the same right to the interference of this Court in their behalf, as was shown by the State of Pennsylvania in that. In fact, every question of law which has been agitated in the argument, either in these cases, or the one which preceded them, has been fully considered and decided by the Supreme Court in that case, and it is unnecessary for this Court to vindicate their decision by further argument.

Let us now proceed to examine the facts and evidence on the present motion, and how far they will justify the interference of this Court by injunction. At common law, every obstruction, however small, to the free navigation of a public river, might, in strictness, be styled a nuisance. But the stringent application of this definition to every bridge over every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, would be absurd and highly injurious to the public interests. Intercourse by means of turnpikes, canals, railroads, and bridges, is a public necessity. A railroad constructed by the authority of a State, is often many thousand times more beneficial to the interests of commerce than the unlimited freedom of navigation over unimportant inlets, creeks or bays, or remote portions of a harbor. It would be unreasonable to insist that the millions who travel on them should be subjected to great delay or annoyance for the convenience of a few sloops or fishing smacks.

Where bridges are constructed with draws, or openings for the passage of masted vessels, and high enough to permit others to pass under if possible, the occasional delay of such vessels for a short time may be a trifling inconvenience, in comparison with the public benefit of the bridge. In every investigation of this kind the question is relative, not absolute. Whether a certain erection be a nuisance must depend upon the peculiar circumstances of each case—when the trade of the channel is of great amount and importance, and that across it trifling, the same rule cannot apply, as

to a case where the conditions are contrary. If a steam ferry can amply accomodate those who cross the stream, and a bridge with a draw would inflict an injury on commerce, and tax the public by increased freight, there is no sufficient reason why a bridge should be erected because it will be more profitable stock than a steamboat or towboat, or better accommodate some small neighborhood or neck of land.

The city of Boston is situated on a peninsula. No public necessity could well exist which would justify a bridge, compelling *all* the commerce of her port to pass through a draw; while it might be very reasonable that vessels passing from one part of the port or harbor to another, should be compelled to submit to some inconvenience for the sake of a bridge erected for one of the great railroads, so important to the prosperity and wealth of the city.

It would be an abuse of the term to call the Schuylkill dam a nuisance, because it is below tide-water, and converts a few miles of useless sloop navigation into a canal which annually adds millions to the wealth of the city and State, and whose commerce constitutes the staple of this western portion of the port of Philadelphia. Nor is it any appreciable injury to the commerce of the port that vessels with high masts cannot pass the Market Street bridge. Ample space for those vessels still remains at the wharves below. The great staple of this western port is coal, and this bridge is built of such a height as not to interfere with the passage of the steamtugs and canal boats engaged in transporting it. The city of Philadelphia now extends across the Schuylkill, and such a bridge is a public necessity. The same may possibly be said of the Gray's Ferry bridge, over which the railroad to Baltimore passes. Vessels with masts, and steamboats with high chimneys, are, no doubt, put to considerable inconvenience in passing the draw; but the bridge is built so high that the immense trade in coal can pass under it without interruption. Besides, when this bridge was first erected, the commerce of the river was of little importance compared to its present condition, and the mode of transporting the coal has accomodated itself to the state of the navigation and its impediments, as they then existed. If the erection of such a bridge at that place were now proposed for the first time, its propriety might have admitted of some doubt. * *

*Angell on Waters, p.* 64.

Hence the States, in reference to their right of property in the

tide-waters which were within their jurisdictional limits, correspond, in reference to the control of the general government, to individuals who have acquired an exclusive property in the soil covered by an arm of the sea by a grant from the State. In such case, the public are entitled to an easement in such arm of the sea for the transportation of goods, merchandise, and passengers in boats and vessels; and the sovereign power of the State may by law prescribe rules and regulations to preserve this public erasement unimpaired. No appropriation of the soil can be made, however, except by the grantee of the soil himself; but the grantee cannot so exercise his right of property as to obstruct or render inconvenient the navigation any more than the person who has the fee simple of a road can obstruct or annoy the passing over it. As it is expressed by Lord Hale, the *jus privatum* is subject to the *jus publicum*, (Hale, De Jure Maris, Harg. Tracts, 32.) The *jus privatam* of each State in its tide-waters is subject to the *jus publicum* of the United States and of the people of the United States, which is a free and uninterrupted passage to the people of every State. The States have authority to pass all laws to regulate the tide-waters and the soil under them within the jurisdiction of the sovereignty which their governments may deem useful or expedient, if they do not come into collision with any law made by Congress in virtue of the constitutional powers which have been mentioned, with which Congress is invested.

Ibid., page 89.

Every creek or river into which the tide flows, it has been held in England, is not, on that account, necessarily a public navigable river.

If it is navigable only at certain periods of the tide, and then only for a very short time, it is not to be supposed to be a navigable channel, and no individual can complain of its obstruction. (Per Bayley, J., in the King *vs.* Montague, 4 B. and C., 589, and 10 Eng. Com. Law R., 413.) But Lord Mansfield says, "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows which are not navigable rivers, and the place in question may be a creek in their own private estate." Again, in *Miles* vs. *Rose*, 5 Taunt. 706, *Gibbs*, C. J., says that the flowing of the tide, though not absolutely inconsistent with right of private creek, is strong *prima facie* evidence of its being a

public navigable river; and *Heath*, J., expresses the same opinion, The strength of this *prima facie* evidence arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel."

Ibid., p. 90.

Mr. C. J. Shaw observed: "It is not every ditch, in which salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream; nor is it every small creek, in which a fishing skiff or a gunning canoe can be made to float at high water, which is deemed navigable." In Rowe *vs.* Granite Bridge.

*Opinion of Mr. C. J. Marshall, in the case of Wilson vs. Blackbird Creek Marsh Co., 2 Peters 245:*

"The act of Assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks passing through a deep level marsh adjoining the Delaware, up which the tide flows and reflows for some distance. The value of the property on its banks must be enhanced by excluding the waters from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this Act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the Government of Delaware and its citizens, of which this Court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce wit[h] foreign nations and among the several States.' If Congr[ess] passed any act which bore upon the case—any act i[n]

the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks, into which the tide flows, and which abound everywhere throughout the lower country of the southern and middle States, we should feel not much difficulty in saying that a State law coming in contact with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the States, a power which has not been so exercised as to affect the question. We do not think that the Act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

*Points made on behalf of Livingston, in case of Livingston* vs. *Van Ingen*, 9 *Johnson*, 523, p. 534.

"3. That in every government there must be a supreme or sovereign power, which has the entire authority of shutting up and regulating rivers and roads. This supreme power has never been ceded to Congress, and must, therefore, of course, remain in the State, which alone is the judge of the expediency of exercising it.

"4. That the waters *within the territory of the respective* States are the *property of the* States, and that the legislature of this State has as great power over its territory as an individual has over his property; and has as much power to regulate or restrain the use of an invention, in the territory of the State, as an individual would have to prohibit the use of his own property."

Opinion of Court per Kent, 9 Johnson, p. 579.

The Constitution of the *United States* does not prevent this State from filling up the mouth of the *Hudson*, so as to prevent the navigation altogether. If such a thing should be done, however, we might deplore the folly or madness of the measure; it would be an act of sovereignty to which all must submit. The only control or check to such an exercise of power must be the good sense of the legislature, the interests of the people, and the force of pub-

* * * * *

Congress, indeed, has not any direct jurisdiction over our interior commerce or waters. *Hudson River is the property of the people of this State*, and the legislature have the same jurisdiction over it that they have over the land, or over any of our public highways, or over the waters of any of our rivers or lakes.

p. 589.

*Appropriations made by Congress for the Improvement of Harbors and Rivers, Light Houses, &c.*

Syn. Index, U. S. at large, pp. 62 to 70, 75 to 89.
X. U. S. Stat. at large, 56, 112, 240, 335, 608, 640.
XI. " " 96, 100, 425.

## MAINE.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Kennebec River, Imp., | $153,000 | $66,630 | $219,630 |
| Cobscook Bay, | 53,000 | | 53,000 |
| Penobscot River, | 300 | 52,000 | 52,300 |
| Piscataqua River, | 10,250 | 180 | 10,430 |
| Kennebunk River, | 41,975 | 19,500 | 61,475 |
| Portland Harbor, | 116,826 | 6,550 | 123,376 |
| Passamaquody Bay, | | 28,000 | 28,000 |
| Generally, | 2,000 | 419,455 | 421,455 |
| Total, | | | $969,666 |

## NEW HAMPSHIRE.

| | Light Houses, &c. | Total. |
|---|---|---|
| Portsmouth, | $35.100 | $35,100 |
| Generally | 5,500 | 5,500 |
| Total, | | $40,600 |

## MASSACHUSETTS.

| | Improvements. | Light Houses, &c. | Total, |
|---|---|---|---|
| Merrimack River, | $132,423 | | $132,423 |
| Boston Harbor, | 412,363 | 945,500 | 1,457,863 |
| Paxbury River, | 5,000 | | 5,000 |
| Edgarton Harbor, | 2,500 | | 2,500 |
| Hyamis Harbor, | 75,331 | 3,000 | 78,331 |
| New Bedford Harbor, | 19,691 | | 19,691 |
| Nantucket Harbor, | 64,265 | 168,250 | 232,515 |
| Provincetown Harbor, | 27,850 | | 27,850 |
| Salem Harbor, | | 29,757 | 29,757 |
| Cape Cod Harbor, | 5,000 | 46,500 | 51,500 |
| Martha's Vineyard, | | 50,475 | 50,475 |
| Chaldron Harbor, | | 7,000 | 7,000 |
| Plymouth Harbor, | 6,000 | 4,350 | 10,350 |
| Generally, | | 487,222 | 487,222 |
| | | | $2,592,477 |

## VERMONT.

| | Improvements. | Total. |
|---|---|---|
| St. Alban's Harbor, | $15,000 | $15,000 |
| Burlington Harbor, | 17,000 | 17,000 |
| White Hall Harbor, | 33,000 | 33,000 |
| | | $65,000 |

## RHODE ISLAND.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Providence Harbor, | $5,000 | $4,100 | $9,100 |
| Narragansett Bay, | | 5,890 | 5,890 |
| Newport Harbor, | | 4,850 | 4,850 |
| Generally, | | 172,126 | 172.1[illegible] |

## CONNECTICUT.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Mill River, | $11,587 | $2,600 | $14,187 |
| Thames River, | 40,150 | | 40,150 |
| Black Rock Harbor, | 53,098 | 7,710 | 60,808 |
| Fairweather Island Harbor, | 21,550 | 16,500 | 38,050 |
| Stonington Harbor, | 3,649 | 4,000 | 7,649 |
| South Port Harbor, | 17,500 | 1,000 | 18,500 |
| West Port Harbor, | 11,616 | | 11,616 |
| New Haven Harbor, | 6,000 | 23,750 | 29,750 |
| Long Island Sound, | | 43,630 | 43,630 |
| Generally, | | 132,530 | 132,530 |
| | | | $396,870 |

## NEW YORK.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Genessee River, | $192,395 | $5,750 | $198,145 |
| Sandy Creek, | 30,000 | | 30,000 |
| Hudson River, | 330,000 | 27,678 | 357,678 |
| Buffalo Harbor, | 25,394 | 17,006 | 42,400 |
| Black River, | 37,401 | | 37,401 |
| Sodus Bay Harbor | 143,490 | | 143,490 |
| Cattaraugus Creek, | 57,460 | | 57,460 |
| Dunkirk Harbor, | 90,374 | | 90,374 |
| New York Harbor, | 19,500 | 273,592 | 293,092 |
| Generally, | | 854,445 | 884,445 |
| | | | $2,134,485 |

## PENNSYLVANIA.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| | $85,546 | $6,167 | $91,713 |

## NEW JERSEY.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Tucker Island, | $100 | $6,080 | $6,180 |
| Little Egg Harbor, | 23,500 | 2,100 | 25,600 |
| Big Egg Harbor, | 1,500 | 200 | 1,700 |
| Cape May Harbor, | | 10,750 | 10,750 |
| Barnegat Harbor, | 1,000 | 51,600 | 52,600 |
| Delaware Bay, | | 17,000 | 17,000 |
| Jersey Shore, | | | |
| Elizabeth Port, | | 3,600 | 3,600 |
| Newark Harbor, | 12,000 | 51,450 | 73,450 |
| Absecom Harbor, | | 58,636 | 58,636 |
| Raritan Bay, | | 6,100 | 6,100 |
| Squam Beach, | | 6,000 | 6,000 |
| Generally, | | 34,400 | 34,400 |
| | | | $2,960,016 |

## DELAWARE.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Breakwaters, | $1,883,000 | $30,200 | $1,913,200 |
| New Castle Harbor, | 46,573 | | 46,573 |
| Port Penn Harbor, | 51,000 | 20,550 | 71,550 |
| Bombay Hook Harbor, | | 9,000 | 9,000 |
| Wilmington Harbor, | 28,847 | 154,802 | 183,649 |
| Thom Point, | | 1,500 | 1,500 |
| Five Fathom Point, | | 15,000 | 15,000 |
| Indian River, | | 5,000 | 5,000 |
| Generally, | | 130,500 | 130,500 |
| | | | $2,375,972 |

## MARYLAND.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Chesapeake Bay, (In Maryland,) | $24,260 | $251,582 | $275,842 |
| Baltimore Harbor, | 124,000 | 75,000 | 199,000 |
| Havre de Grace, | 10,000 | | 10,0[illegible] |

## VIRGINIA.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Chesapeake Bay, (In Virginia.) | $20,000 | $341,969 | $361,969 |
| James River, | 455,000 | 35,000 | 490,000 |
| Rappahannock River, | 3,000 | | 3,000 |
| | | | $854,969 |

## NORTH CAROLINA.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Pascotank River, | $ 80 | $ 1,000 | $1,080 |
| Beaufort Harbor, | 80 | 6,000 | 6,080 |
| Cape Fear River, | 240,633 | 304,622 | 545,255 |
| Ocracock River, | 132,750 | 35,750 | 168,500 |
| Pamlico Sound, | 10,000 | 74,140 | 84,140 |
| New River, | 25,000 | | 25,000 |
| Plymouth Harbor, | 58,267 | | 58,267 |
| Neuse River, | | 11,000 | 11,000 |
| Albemarle, | | 53,600 | 53,600 |
| Cape Hatteras, | | 35,500 | 35,500 |
| Generally, | | 84,690 | 84,690 |
| | | | $1,073,112 |

## SOUTH CAROLINA.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Georgetown, | $ 1,000 | $ 28,520 | $29,520 |
| Charleston, | | 75,450 | 75,450 |
| Port Royal, | | 31,500 | 31,500 |
| Santee River, | | 6,000 | 6,000 |
| Edisto River, | | 3,050 | 3,050 |
| St. Helena Sound, | | 31,300 | 31,300 |
| Calibogue Sound, | | 40,000 | 40,000 |
| Generally, | | 107,300 | 107,300 |
| | | | $324,120 |

## GEORGIA.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| Savannah River, | $402,490 | $30,850 | $433,340 |
| Brunswick Harbor, | 10,000 | 39,540 | 49,540 |
| Cumberland Sound, | | 24,000 | 24,000 |
| Japelo Sound, | | 25,605 | 25,605 |
| St. Mary's River, | | 32,300 | 32,300 |
| Altamaha Sound, | | 7,500 | 7,500 |
| Generally, | | 28,500 | 28,500 |
| | | | $600,785 |

## FLORIDA.

| | Improvements. | Light Houses, &c. | Total. |
|---|---|---|---|
| St. Marks, | $28,530 | | $28.530 |
| Chipola, | 4,000 | | 4,000 |
| Escambia River, | 5,500 | 18,630 | 24,130 |
| Florida Keys, | | 326,710 | 326,710 |
| Pensacola Harbor, | | 6,180 | 6,180 |
| St. John's River, | | 46,350 | 46,350 |
| Apalachiola Bay, | | 52,400 | 52,400 |
| Generally, | | 148,700 | 148,700 |
| | | | $637,000 |

## ALABAMA.

| | | | |
|---|---|---|---|
| Mobile Bay, | $187,277 | $512,120 | $699,397 |

## CUSTOM HOUSES OF ATLANTIC COAST.

| | | |
|---|---|---|
| MAINE, | | |
| Portland, | $351,400 | |
| Bath, | 40,500 | |
| East Port, | 353,000 | |
| Castine, | 2,200 | |
| Wiscasset, | 2,200 | |
| Walborough, | 25,000 | |
| Bangor, | 20,000 | |
| | | $794,300 |
| MASSACHUSETTS, | | |
| Boston, | | 1,373,033 |
| CONNECTICUT, | | |
| Middletown, | 4,800 | |
| Belfast, | 3,850 | |
| | | 8,650 |
| RHODE ISLAND, | | |
| Providence, | | 25,000 |
| NEW JERSEY, | | |
| Perth Amboy, | | 20,000 |
| NEW YORK, | | |
| New York, | | 28,733 |
| DELAWARE, | | |
| Wilmington, | | 37,000 |
| VIRGINIA, | | |
| Norfolk, | 15,450 | |
| Richmond, | 35,050 | |
| | | 50,500 |
| NORTH CAROLINA, | | |
| Wilmington, | 40,000 | |
| Plymouth, | 100 | |
| | | 40,100 |
| SOUTH CAROLINA, | | |
| Charleston, | | 735,000 |
| GEORGIA, | | |
| Savannah, | | 155,000 |
| FLORIDA, | | |
| Key West, | | 1,625 |
| ALABAMA, | | |
| Mobile, | | 86,690 |
| LOUISIANA, | | |
| New Orleans, | | 725,758 |
| Generally for Custom Houses, | | 278,418 |
| | | $4,359,817 |

## RECAPITULATION.

| STATES. | Improvements. Light Houses. | Custom Houses, &c. | Total. |
|---|---|---|---|
| Maine, | $959,666 | $794,300 | $1,763,966 |
| New Hampshire, | 40,600 | | 40,600 |
| Vermont, | 65,000 | | 65,000 |
| Massachusetts, | 2,519,477 | 1,373,033 | 3,892,510 |
| Rhode Island, | 191,966 | 25,000 | 216,966 |
| Connecticut, | 396,870 | 8,650 | 405,520 |
| New York, | 2,134,485 | 28,733 | 2,163,218 |
| New Jersey, | 296,016 | 20,000 | 316,016 |
| Pennsylvania, | 91,713 | | 91,713 |
| Delaware, | 2,375,972 | 37,000 | 2,412,972 |
| Maryland, | 484,842 | | 484,842 |
| Virginia, | 854,969 | 50,500 | 905,469 |
| North Carolina, | 1,073,112 | 40,100 | 1,113,212 |
| South Carolina, | 324,120 | 735,000 | 1,059,120 |
| Georgia, | 600,785 | 155,000 | 755,785 |
| Florida, | 637,000 | 1,625 | 638,625 |
| Alabama, | 699,397 | 86,690 | 786,087 |
| | $13,868,980 | $3,355,641 | $17,224,521 |
| Generally for Custom Houses, | | 1,004,176 | 1,004,176 |
| | | $4,359,817 | $18,228,797 |

Annual cost of Light Houses from 1792 to 1857, (see Index, p 92,) 12, 137, 898.

1857, $1,081,800.
1858, 638,000.
1859, 845,000.

In 1858, there were five hundred and fifty-six Light Houses.

1353

# IX

## ANNUAL EXPENDITURES OF THE COAST SURVEY.

See Report of Secretary of Treasury, XXXVth Congress, Second Session; Senate. Executive Document, No. 6.

Also, see XI, Statutes at Large, pp. 319, 425.

| | |
|---|---|
| 1800 to 1844, . . . | $893,900.00 |
| 1844, . . . | 96,704.45 |
| 1845, . . . | 92,769.18 |
| 1846, . . . | 112,824.55 |
| 1847, . . . | 125,291.81 |
| 1848, . . . | 151,667.31 |
| 1849, . . . | 201,368.93 |
| 1850, . . . | 213,796.49 |
| 1851, . . . | 228,492.86 |
| 1852, . . . | 234,765.56 |
| 1853, . . . | 226,113.07 |
| 1854, . . . | 294,070.94 |
| 1855, . . . | 286,158.75 |
| 1856, . . . | 331,886.66 |
| 1857, . . . | 177,850.53 |
| 1858, . . . | 478,800.00 |
| 1859, . . . | 453,800.00 |
| Total . | $4,600,261.09 |

# X

## APPROPRIATIONS FOR FORTIFYING HARBORS, ETC.

| | | |
|---|---|---|
| Harbors of Maine, Kennebec River, | $100,000 | |
| Penobscot River, | 108,000 | |
| Portland, . | 1,041,600 | |
| | | $1,249,600 |
| Boston, . . . . | | 96,300 |
| Newport, . . . . | | 195,000 |
| New London, . . . . | | 215,000 |
| New York, . . . . | | 2,884,300 |
| Delaware River and Bay, . . | | 929,000 |
| Chesapeake Bay, | | |
| Fort Monroe, | $1,609,200 | |
| Sundry Forts, | 1,432,000 | |
| Baltimore, . | 587,000 | |
| | | $3,628,200 |
| Fort Adams, . . . | | 980,000 |
| Fort Macon, (Coast N. Car.) . . | | 319,500 |
| Fort Washington, . . . | | 168,500 |
| Mobile Bay, . . . . | | 1,058,000 |
| Fort Cockspur, . . . | | 393,300 |
| St. Augustine, . . . | | 38,000 |
| Fort Jackson, . . . | | 483,500 |
| Pensacola Bay, . . . | | 1,135,200 |
| Charleston, . . . . | | 1,246,600 |
| Savannah, . . . . | | 220,000 |
| Mouth of Cape Fear River, . . | | 579,900 |
| Fortifications in general, . . | | 2,539,000 |
| Total, | | $18,359,900 |

See Statutes at large,
II., 547.
IV., 256, 356, 374, 450, 497, 610, 645. 22, 92, 149, 211.
V., 77, 407, 415, 458.
IX., 11, 248, 373, 517.

*Table showing the shore line of States on the Atlantic and Gulf of Mexico.*

| STATES. | Shore line of coast washed by sea. | Washed by bays, sounds, &c. | Shore line of rivers to the head of tide. |
|---|---|---|---|
| Maine, | 427 | 1,599 | 427 |
| New Hampshire, | 13 | 37 | 24 |
| Massachusetts, | 209 | 865 | 832 |
| Rhode Island, | 55 | 153 | 232 |
| Connecticut, | 14 | 139 | 1,074 |
| New York, | 114 | 886 | 1,057 |
| New Jersey, | 118 | 702 | 151 |
| Pennsylvania, | | | 106 |
| Delaware, | 29 | 136 | 506 |
| Maryland, | 44 | 1,008 | 3,401 |
| Virginia, | 148 | 735 | 1,690 |
| North Carolina, | 299 | 1,559 | 932 |
| South Carolina, | 192 | 356 | 708 |
| Georgia, | 76 | 410 | 468 |
| Florida, | 1,020 | 3,005 | 860 |
| Alabama, | 33 | 284 | 313 |
| Mississippi, | 42 | 206 | 137 |
| Louisiana, | 616 | 1,595 | 936 |
| Texas, | 353 | 1,284 | 432 |
| | 3,802 | 15,049 | 14,286 |

Total, Northern, 9.334 miles.
" Southern, 23,803 "

Copied from the Archives of the U. S. Coast Survey.

Attest, W. W. COOPER,
*Clerk to Supd't U. S. Coast Survey.*

*Dec.* 16, 1859.

*Number of harbors in the different States on the coast, and the principal ones on rivers to the head of tide.*

(Incomplete.)

| STATES. | Numbers of Harbors, not including all upon rivers. |
|---|---|
| Maine, | 52 |
| New Hampshire, | 3 |
| Massachusetts, | 51 |
| Rhode Island, | 7 |
| Connecticut, | 32 |
| New York, | 27 |
| New Jersey, | 14 |
| Pennsylvania, | 3 |
| Delaware, | 3 |
| Maryland, | 11 |
| Virginia, | 22 |
| North Carolina, | 52 |
| South Carolina, | 21 |
| Georgia, | 15 |
| Florida, | 66 |
| Alabama, | 4 |
| Mississipi, | 10 |
| Louisiana, | 33 |
| Texas, | 12 |
| | 438 |

*Dec.* 10, 1856.

Copied from the Archives of the U. S. Coast Survey.

Attest. W. W. COOPER,
*Clerk to Supd't U. S. Coast Survey.*

*Dec.* 16, 1859.

1857

## TOPOGRAPHY—SHORE LINE—ACCORDING TO THE RESPECTIVE STATES.

| STATES | Previous to 1844. | 1844. | 1845. | 1846. | 1847. | 1848. | 1849. | 1850. | 1851. | 1852. | 1853. | 1854. | 1855. | 1856. | Total to 1857 inc've. | Incomplete. | Total to 1858 inclu've |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Maine, | — | — | — | — | — | — | — | 18 | — | 40 | 27 | 35 | — | 57 | 136 | 313 | 83 | 396 |
| New Hampshire, | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — | — |
| Massachusetts, | — | 129 | 317 | 643 | 408 | 120 | — | 46 | 154 | 177 | 224 | 105 | 116 | 42 | 94 | 2,575 | 51 | 2,626 |
| Rhode Island, | 470 | 110 | — | — | — | — | — | — | — | — | — | — | — | — | — | 580 | — | 580 |
| Connecticut, | 1,540 | — | — | 41 | — | 17 | — | 53 | — | — | — | — | — | — | — | 1,651 | — | 1,651 |
| New York, | 2,172 | 52 | 17 | — | — | 16 | — | — | — | — | 69 | 38 | 240 | 386 | 192 | 3,182 | 87 | 3,269 |
| New Jersey, | 2,650 | — | — | 6 | — | — | — | 18 | 20 | — | 25 | — | 181 | — | 19 | 2,919 | 212 | 3,131 |
| Pennsylvania, | 46 | — | — | — | — | — | — | — | — | — | — | — | — | — | — | 46 | — | 46 |
| Delaware, | 392 | — | 177 | 5 | — | — | — | 56 | — | — | — | — | — | — | — | 610 | — | 610 |
| Maryland, | 24 | 158 | 388 | 756 | 962 | 769 | 948 | 280 | 37 | 40 | 70 | 76 | — | — | — | 4,508 | — | 4,508 |
| Virginia, | — | — | — | — | — | — | 352 | 481 | 437 | 168 | 465 | 496 | 335 | 193 | 174 | 3,101 | 572 | 3,673 |
| North Carolina, | — | — | — | — | 186 | 104 | 95 | 204 | 285 | 463 | 227 | 29 | — | 209 | 414 | 2,216 | 354 | 2,570 |
| South Carolina, | — | — | — | — | — | — | 150 | 7 | 119 | — | — | 145 | 200 | 369 | 43 | 1,033 | 188 | 1,221 |
| Georgia, | — | — | — | — | — | — | — | — | — | 112 | — | — | — | — | 184 | 296 | 501 | 797 |
| Florida (Atl'c c'st) | — | — | — | — | — | — | — | 12 | 39 | — | 36 | — | 115 | 22 | 174 | 398 | 61 | 459 |
| Atlantic Coast, | 7,294 | 449 | 879 | 1,451 | 1,556 | 1,026 | 1,545 | 1,175 | 1,091 | 1,000 | 1,143 | 924 | 1,187 | 1,278 | 1,430 | 23,428 | 2,109 | 25,537 |
| Florida (Gulf c'st) | — | — | — | — | — | — | — | 54 | 66 | 25 | 103 | 233 | 332 | 314 | 616 | 1,743 | 612 | 2,355 |
| Alabama, | — | — | — | 17 | 76 | 20 | 127 | 178 | — | — | 18 | — | — | — | — | 436 | — | 436 |
| Mississippi, | — | — | — | — | 7 | 306 | 37 | — | 138 | 171 | 228 | — | — | 6 | — | 893 | — | 893 |
| Louisiana, | — | — | — | — | — | — | — | — | — | 11 | 179 | — | 379 | 37 | 388 | 994 | — | 994 |
| Texas, | — | — | — | — | — | — | — | 120 | 328 | 149 | 66 | 224 | 149 | 218 | 408 | 1,662 | 597 | 2,259 |
| Gulf Coast, | — | — | — | 17 | 83 | 326 | 164 | 352 | 532 | 356 | 594 | 457 | 860 | 575 | 1,412 | 5,728 | 1,209 | 6,937 |
| California, | — | — | — | — | — | — | — | 30 | 76 | 251 | 363 | 412 | 136 | 469 | 1,113 | 2,850 | 44 | 2,894 |
| Oregon, | — | — | — | — | — | — | — | — | 43 | — | — | — | — | — | — | 43 | — | 43 |
| Washington Terr., | — | — | — | — | — | — | — | — | 18 | 18 | — | 3 | 40 | 89 | 22 | 190 | 96 | 286 |
| Pacific Coast, | — | — | — | — | — | — | — | 30 | 137 | 269 | 363 | 415 | 176 | 558 | 1,135 | 3,083 | 140 | 3,223 |
| **GENERAL SUMMARY.** | | | | | | | | | | | | | | | | | | |
| Atlantic Coast, | 7,294 | 449 | 879 | 1,451 | 1,556 | 1,026 | 1,545 | 1,175 | 1,091 | 1,000 | 1,143 | 924 | 1,187 | 1,278 | 1,430 | 23,428 | 2,109 | 25,537 |
| Gulf Coast, | — | — | — | 17 | 83 | 326 | 164 | 352 | 532 | 356 | 594 | 457 | 860 | 575 | 1,412 | 5,728 | 1,209 | 6,937 |
| Pacific Coast, | — | — | — | — | — | — | — | 30 | 137 | 269 | 363 | 415 | 176 | 558 | 1,135 | 3,083 | 140 | 3,223 |
| Total Coast, | 7,294 | 449 | 879 | 1,468 | 1,639 | 1,352 | 1,709 | 1,557 | 1,760 | 1,625 | 2,100 | 1,796 | 2,223 | 2,411 | 3,977 | 32,239 | 3,458 | 35,697 |

December 19, 1859. Copied from the Archives of the United States Coast Survey. Attest, W. W. COOPER, Clerk Sup't.

1359

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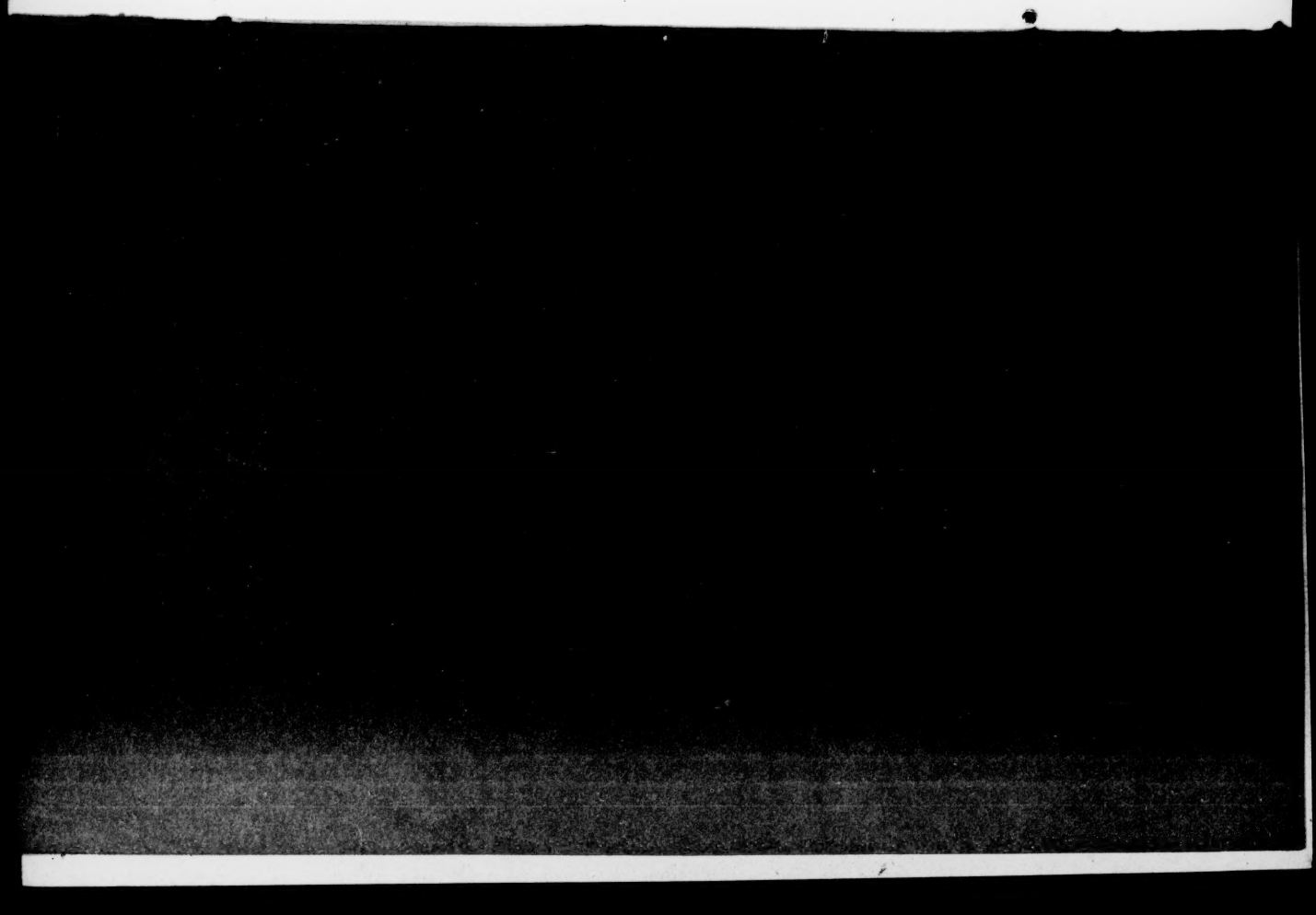
# Circuit Court of the United States

FOR THE

## DISTRICT OF NEW JERSEY.

**September, 1857.**

MILNOR *vs.* THE NEW JERSEY RAILROAD COMPANY, ET AL.
SHARDLOW *vs.* THE SAME.
BIGELOW *vs.* THE SAME.
MILNOR *vs.* NEWARK PLANK ROAD COMPANY, ET AL.
SHARDLOW *vs.* THE SAME.



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# Circuit Court of the United States for the District of New Jersey.—Sept., 1857.

MILNOR *vs.* THE NEW JERSEY RAILROAD COMPANY ET AL.

SHARDLOW *vs.* THE SAME.

BIGELOW *vs.* THE SAME.

MILNOR *vs.* NEWARK PLANK ROAD COMPANY ET AL.

SHARDLOW *vs.* THE SAME.

These were several bills in equity, for injunctions and other relief, upon the facts and for the purposes set forth in the opinion below. Interlocutory injunctions had been granted, and now, September 22d, 1857, upon final hearing, and after a full argument, the opinion of the court was delivered by

GRIER, J.—The object of these five several bills is to obtain injunctions prohibiting the erection of certain bridges over the Passaic river. One of these is proposed to be erected at a point called the Commercial Dock, in the city of Newark, by the New Jersey Railroad and Transportation Company, the other, by the Newark Plank Road Company, near the mouth of the Passaic river and some two and a half miles below the wharves of the port of Newark. The erection of these bridges is authorized by the legislature of New Jersey. They are required to have pivot draws, leaving two passages of sixty-five feet each for the passage of vessels navigating the river or harbor. The first of these bridges is required in order to avoid certain curves in the railroad where it passes through Newark, and to make it straight. The other to ac-

commodate the large and increasing commerce between the cities of New York and Newark, on the plank road connecting the lower end of Newark with Jersey City.

It will not be necessary to a proper consideration of the several questions affecting the decision of these cases, to give an abstract either of the pleadings or the testimony. Where opinions are received in evidence, there can be no restraint as to quantity. Such testimony is always affected by the feelings, prejudices and interests of the witnesses, and is of course contradictory. A skipper will pronounce every bridge a nuisance, while travelers on plank or railroads will not think it proper that their persons or property should be subject to delay, or risk of destruction, to avoid an inconvenience or slight impediment to sloops or scooners; owners of wharves or docks who may apprehend that their interests may be affected by a change of location of a bridge, are unanimous in their opinion that public improvement had better be arrested than that their interest should be affected. In this conflict of testimony and discordant opinion, we shall not stop to make any invidious comparisons as to the credibility of witnesses, but assume such facts as we believe to be proven, without attempting to vindicate the propriety of our assertions.

I. The first of the three great questions so ably discussed by the learned counsel in these cases, is briefly and lucidly stated in the following propositions, which complainants have endeavored to establish:

1st, "That the Passaic river is a public highway of commerce, which under the constitution of the United States has been regulated by Congress."

2d, "That the free navigation of the Passaic river as a common highway having been established by regulation of Congress, and by compact between the States, it cannot lawfully be obstructed by force of any State authority or legislation."

3d, "The bridges proposed to be erected by the New Jersey Railroad Company and Plank Road Company will be each an obstruction to the free navigation of the Passaic river, and public nuisances."

"Consequently this court will enjoin their erection, on complaint of any injured party."

So far as these propositions involve the facts of the case, we find them to be as follows:

The Passaic is a river having its springs and its outlet wholly within the State of New Jersey.

Though a small and narrow river, it is navigable for sloops, schooners, and the smaller classes of steamboats as far as the tide flows, some miles above Newark; at the upper end, and above this city there are several bridges, with small draws, and difficult to pass. These were all erected by authority of the State, and one of them more than fifty years ago. The city of Newark has been made a port of entry by act of Congress, has some little foreign commerce, and some with ports of other States. Being in fact but a manufacturing suburb of New York, much the largest portion of her commerce is with that city, and carried on the rail and plank roads connecting them.

That the proposed bridges will in some measure cause an obstruction to the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction in the channel of a river, but it is not necessarily a nuisance. Bridges are highways as necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands cannot be called a public nuisance because it causes some inconvenience or affects the private interests of a few individuals.

Now, if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit, without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed and controlled? Is this a matter of judicial discretion or legislative enactment? Can that be a nuisance which is authorized by law? Does a

State lose the great police power of regulating her own highways and bridges over her own rivers, because the tide may flow therein, or as soon as they become a highway to a port of entry within her own borders? In the course of seventy years' practical construction of the Constitution, no act of Congress is to be found regulating such erections, or assuming to license a bridge, over such river wholly within the jurisdiction of a State, (if we except the doubtful precedent of the Cumberland road) and during all this time States have assumed and exercised this power. If we now deny it to the States, where do we find any authority in the Constitution or acts of Congress for assuming it ourselves?

These are questions which must be resolved before this court can constitute itself "arbiter pontium," and assume the power of deciding where and when the public necessity demands a bridge, what is a sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

The complainants in these several bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the State of New York. Their right to a remedy in the courts of the United States is not asserted, on account of the subject matter of the controversy, nor do they allege any peculiar jurisdiction as given to us by any act of Congress; but rest upon their personal right as citizens of another State to sue in this tribunal. It is very apparent, also, that the complainants, if not introduced as mere John Does or nominal parties (while those really contending are used as witnesses) are at least volunteers in this controversy, "*post litem motam*," who have bought the right to an expected injury for the luxury of the litigation.

Without stopping to laud this exhibition of a public spirit by citizens of a neighboring State, it is plain by their own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the State of New Jersey in a suit between her own citizens. A citizen of New York who purchases wharves in Newark or owns a vessel navigating to that port, has no greater right than the

citizen of New Jersey. A court of chancery in New Jersey would not interfere with the course of public improvements authorized by the State, at the instance of a wharf owner on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result, for which (if the court can give any remedy at all,) it will interfere by injunction. The court has no power to arrest the course of public improvements, on account of their effects upon the value of public property, appreciating it in one place and depreciating it in another. If special damage occurs to an individual, the law gives him a remedy. But he cannot recover either in a court of law or equity special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the State of New Jersey cannot be treated as a nuisance under the laws of New Jersey. That the police power of a State includes the regulation of highways and bridges within its boundaries, has never been questioned. If the legislature have declared that bridges erected with draws of certain dimensions will not so impede the commerce of the river, as to be injurious or become a public nuisance, where can the courts of New Jersey find any authority for overruling, reversing or nullifying legislative acts on a subject matter over which it has exclusive jurisdiction? Admitting, for the sake of argument, that Congress, in the exercise of the commercial power, may regulate the height of bridges on a public river in a State below a port of entry, or may forbid their erection altogether, they have never yet assumed the exercise of such a power, nor have they by any legislative act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey. The United States has no common law offences, and has passed no statute declaring such an erection to be a nuisance. If so, a court cannot interfere by arbitrary decree either to restrain the erection of a bridge or to define its form and proportions. It is plain that these are subjects of legislative not judicial discretion. It is a power which has always heretofore been exercised by State Legislatures over rivers wholly within their

jurisdiction, and where the rights of citizens of other States to navigate the river are not injured, for the sake of some special benefit to the citizens of the State exercising the power.

But it has been contended, that on the authority of a dictum of my own, in *Devoe* vs. *The Penrose Ferry Bridge Company*, "that the Supreme Court have decided in the case of *Penn* vs. *The Wheeling Bridge*, 13 How. 579, that although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that as courts of chancery they my interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a State." 3 Amer. Law Reg. p. 83.

It is true that this doctrine was enunciated as a corollary from the Wheeling Bridge case, on a motion for an interlocutory injunction against a bridge over a stream wholly within the territory and jurisdiction of Pennsylvania. On such motions I have always refused to hear and definitely decide the great points of a case. If there be a prima facie or even doubtful case shown, it is the interest of *both parties* that the interlocutory injunction should issue, and that the defendants should not expend large sums in erections which may *possibly* be treated hereafter by the court as nuisances. In the cases now before us, the same course was pursued; but after the full argument of this question on final hearing, and a most careful consideration of it, I feel bound to acknowledge that the dictum I have just quoted from the report of the case of the Penrose Ferry Bridge Company is not supported by the decision of the Supreme Court in the Wheeling Bridge case. It is true that such an inference might be drawn from a hasty or superficial examination of the opinion of the court as delivered in that case. But the point now to be considered, was not in that case, and could not, therefore, have been decided. No judge in vindicating the judgment of the court, can deliver maxims of universal application, in every sentence, or oracles which

may be read in two ways, one applicable to the case before him, and the other not. To sever the arguments of a judge from the facts of the case to which he refers, will often lead to very erroneous conclusions. The fact that Pittsburg has been made a port of entry may have been mentioned as an additional or cumulative reason why Virginia should not be allowed to license a nuisance on the Ohio, below that city. But the question whether the power to regulate bridges over navigable rivers wholly within the bounds of a State, could be exercised by it below a port of entry, and whether the establishment of such a port did *ipso facto* divest the State of such a power, was not in that case, and therefore not decided. This assertion will be fully vindicated by a careful examination of the record in that case.

1. It must be noted as a circumstance of that case, that although the State of Pennsylvania in her corporate capacity was complainant, and "*propter dignitatem*" entitled to sue in the Supreme Court of the United States; yet, that when the bill was filed, the same complaint might have been sustained in the Circuit Court of the United States, or the bridge might have been prostrated as a nuisance by indictment in the proper state court of Virginia. The bill charged that the bridge proposed to be erected was in utter disregard of the license granted by its charter, which carefully forbid the least interference with the navigation of the Ohio. On the facts charged and proved, a Court of Chancery of Virginia would have been bound to enjoin the erection of so palpable a nuisance to the navigation. The case therefore presented every fact necessary to give the court jurisdiction—a party having a right to sue in the court—a nuisance proposed to be erected without the sanction either of Virginia or the United States, and great special damage to the plaintiff.

2. During the pendency of this suit the Legislature of Virginia saw proper to come to the assistance of their corporation, in the unequal contest, and at its suggestion enacted that the bridge proposed to be built contrary to the license granted to the corporation was according to it, and not therefore to

be considered as a nuisance by the laws of Virginia—notwithstanding that the bridge was without a draw, and for many days in the year would wholly obstruct the passage of steamboats.

3. This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions. Could Virginia license or authorize a nuisance on a public river, which rose in Pennsylvania and passed along the border of Virginia, and which by compact between the States was declared to be "free and common to all citizens of the United States?" If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there could be no measure to her power. She would have the same right to stop its navigation altogether, as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea therefore presented not only a great question of international law, but whether rights secured to the people of the United States, by compact made before the Constitution, were held at the mercy or caprice of every or any of the States, to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defence, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn, that the courts of the United States claim authority to

regulate bridges below ports of entry, and treat all State legislation in such cases as unconstitutional and void.

It is abundantly evident from this statement, that the Supreme Court, in denying the right of Virginia to exercise this absolute control oqer the Ohio river, and in deciding that as a riparian proprietor she was not entitled, either by the compact, or by constitutional law, to obstruct the commerce of a supra-riparian State, had before them questions not involved in these cases, and which cannot affect their decision. The Passaic river, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State; it is no highway to other States, no commerce passes thereon from States below the bridge to States above. Being the property of the State, and no other States having any title to interfere with her absolute dominion, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commeree is carried on within a State. Canals, turnpikes, bridges and railroads are as necessary to the commerce between and through the several States, as rivers. Yet Congress has never pretended to regulate them. When a city is made a port of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each State over her own public rivers. Congress may establish post offices and post roads; but this does not affect or control the absolute power of the State over its highways and bridges. If a State does not desire the accommodation of mails at certain places, and will not make roads and bridges, on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry, is an act for the convenience and benefit of such place, and its commerce; but for the sake of this benefit the constitution does not require the State to surrender her control over the harbor, or the highways leading to it, either by land or water, provided all citi-

zens of the United States enjoy the same privileges which are enjoyed by her own.

Whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the State of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other State. It would still be a port of entry, if Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A State may, in the exercise of its reserved powers, incidentally affect subjects entrusted to Congress without any necessary collision. All railroads, canals, harbors or bridges necessarily affect the commerce not only within a State, but between the States. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a State exercised in bringing her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads and canals, to land as well as water? Assuming the right (which I neither affirm or deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no act of Congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being "a good judge" could hardly be given to one who would endeavor to "enlarge his jurisdiction" by the assumption, or rather usurpation of such an undefined and discretionary power.

The police power to make bridges over the public rivers is as absolutely and exclusively vested in a State as the commer-

cial power is in Congress; and no question can arise as to which is bound to give way, when exercised over the same subject matter, till a case of actual collision occurs. This is all that was decided in the case of *Wilson* vs. *The Blackbird Creek, &c.*, 2 Peters, 257. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of any thing decided in *Gibbons* vs. *Ogden*, or to deny the exclusive power of Congress to regulate commerce. Nor does the Wheeling bridge case at all conflict with either. The case of *Wilson* vs. *The Blackbird Creek, &c.*, governs this—while it has nothing in common with that of the Wheeling bridge.

The view taken by the court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated, what is the proper width of draws on bridges over the Passaic? How far the public necessity requires them? What is the comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the greater one consequent on the want of such bridges? and finally, the comparative merits of curved and straight lines in the construction of railroads. These questions have all been ruled by the Legislature of New Jersey, having (as we believe) the sole jurisdiction in the matter. They have used their discretion in a matter properly submitted to them, and this court has neither the power to decide nor the disposition to say, that it has been injudiciously exercised.



Supreme Court of the United States.

DECEMBER TERM, 1864. IN CHANCERY. No. 141.

# GILMAN,

Appellant,

*vs.*

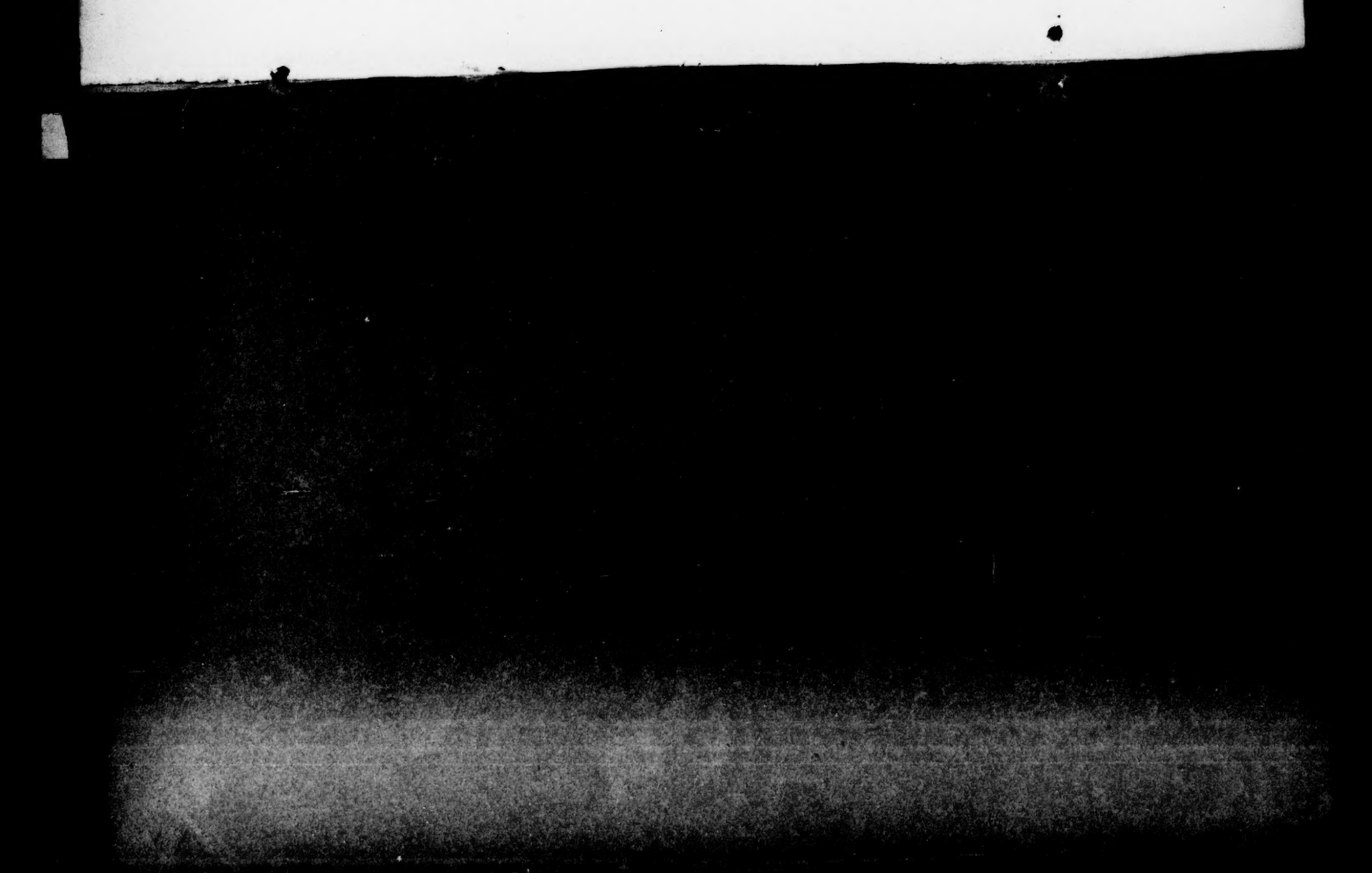
# CITY OF PHILADELPHIA,

Appellees.

## BRIEF OF APPELLEES.

DAVID W. SELLERS,
F. CARROLL BREWSTER,
*Solicitors for Appellees.*

D. W. S. King & Baird, Printers, 607 Sansom Street, Philada.



1879

# *Supreme Court of the United States.*

## December Term, 1864.

### IN CHANCERY.

GILMAN and others, Appellants,
*vs.*
THE CITY OF PHILADELPHIA, and others, Appellees.

No. 141.

# *Brief of Appellees.*

The complainants are seized of an estate in land in Pennsylvania, bounded on the east by the River Schuylkill, and on the west by Bridgwater street. Its eastern front is improved for wharf purposes, and the income for that purpose is derived in part from masted vessels which come to it.

It is alleged that the construction of the bridge on the line of Chestnut street will prevent masted vessels coming to their land, and will diminish their annual income. The amount of decrease is not stated.

The case, therefore, of the complainants is that of owners of land, whose income will be diminished by the construction of a bridge.

The following facts may be stated as conceded:

I. That the bridge is erected in pursuance of law. Flanigan *vs.* City of Philadelphia, 42 Penna. State Reports, pages 209–35.

II. That the complainants are not the owners of licensed coasting vessels—are not pilots—nor navigators.

III. That the River Schuylkill is *wholly* within the State of Pennsylvania, and therefore at no point is the shore of any other State touched by its waters.

It will be observed, therefore, that the jurisdiction of the courts of the United States obtains on the *citizenship* of the complainants, for if they were citizens of Pennsylvania there is no subject-matter of which the Federal Courts possess exclusive original jurisdiction.

The following propositions are submitted to this Court, as well-established doctrine arising on the pleadings of this cause:

I. That complainants, though citizens of a foreign State, have no right incident to their title to land in Pennsylvania which a citizen of that State, owning the same land, would not possess.

II. That as the complainants are not *specially interested in navigation*, they cannot intervene for its protection.

III. That if they may intervene on their ownership of land for the protection of navigation—yet without any act of Congress regulating commerce among the several States which would operate on all navigable rivers, Federal courts have no jurisdiction to decree as prayed by this bill.

The above propositions will be considered separately, though the argument on each will bear on all in some measure.

# I.

Owings *vs.* Norwood's Lessee, 5 Cranch, 344, (1809.) This was an action of ejectment for land in Maryland. The plaintiff relied on a title derived through a statute of that State, which confiscated an interest of a British subject. The defendant sought in the State Court to defeat the title of the plaintiff, because the statute was in contravention of the treaty with Great Britain. The highest court of the State adjudged in favor of the plaintiff. On writ of error to this Court, it was held that as the British subject was not a party to the record, the judgment of a State court on title to land was not renewable.

Elmendorf *vs.* Taylor, 10 Wharton, 153, (1825.) This was an appeal from the decision of the Circuit Court for Kentucky, on a bill to decree a conveyance of land. That Court, following the decisions of the State Court on the effect of title by adverse position, dismissed the bill.

This Court affirmed the decision of the Circuit Court: Chief Justice Marshall remarking, at page 159: "Were this "question now for the first time to be decided, a considerable "contrariety of opinion respecting it would prevail in the "Court; but it will be unnecessary to discuss it, *if the point* "*shall appear to be settled in Kentucky*, [the italization is that of counsel.] "This Court has uniformly professed its "disposition, in cases depending on the laws of a particular "State, to adopt the construction which the courts of the "State have given to these laws. * * * * * * * * * * * * * "On this principle, the construction given by this

"Court to the Constitution and laws of the United States is "received by all as the true construction: and on the same "principle, the construction given by the courts of the "several States is received as true, unless they come in "conflict with the Constitution, laws or treaties of the "United States. *If, then, this question has been settled in "Kentucky, we must suppose it to be rightly settled.*" [The italization is that of counsel.]

Green *vs.* Lessee of Neal, 6 Peters, 292, (1832.) An action of ejectment was brought in the Circuit Court of Tennessee to recover six hundred and forty acres of land. That Court, following the decisions of this Court, adjudged against the defendant, although the judgment in the courts of the State would have been otherwise. On writ of error, Judge McLean remarks, (page 293): "The decision of the "point raised by the bill of exceptions in this case is one of "great importance. * * * * * * * Page 295: "The ques- "tion is now raised whether this Court will adhere to its "own decisions * * or yield to that of the judicial tribunals "of Tennessee. This point has never before been directly "decided by this Court on a question of general importance. "The cases are numerous where the Court have adopted the "constructions given to the Statute of a State by its "supreme judicial tribunal; but it has never been decided "that this Court will overrule their own adjudication, estab- "lishing an important rule of property, where it has been "founded on the construction of a statute made in conformity "to the decisions of the State at the time, so as to conform "to a different construction adopted afterwards by the "State. * * * As a rule of property, it is important." * * * * Page 296: "The opinion then notices McKeen *vs.* Delancey's Lessee, 5 Cranch, 22, in which the decisions of the courts of Pennsylvania, on acknowledgment of a deed before a justice of the Supreme Court, are followed. Of Bodley *vs.* Taylor, 5 Cranch, 221, where the courts of Virginia were followed, "for in questions respecting title to real

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estate especially, the same rule ought certainly to prevail in both courts." And at page 297, the opinion proceeds, "the Supreme Court holds in the highest respect decisions of State courts upon local laws forming rules of property." 2 Wheaton, 316. "In construing local statutes respecting "real property, the courts of the Union are governed by the "decisions of the State tribunals." 6 Wheaton, 119. * * * * * * * * * "The Court again say, in 12 Wheaton, 153, "that this Court adopts the local law of real property, as "ascertained by the decision of the State courts, whether "these decisions are grounded on the construction of the "statutes of the State, or form a part of the unwritten law "of the State, which has become a fixed rule of property. "* * * The rights of parties are determined under these "laws, and it would be a strange perversion of principle if "the judicial exposition of those State laws by the State "tribunals should be disregarded. These expositions con-"stitute the law and for the rule of property." Page 299: "If the construction of the highest judicial tribunal of a "State form a part of its statute law as much as an enact-"ment of the Legislature, how can this Court make a dis-"tinction between them? There could be no hesitation in "so modifying our decisions as to conform to any legislative "alteration in a statute, and why should not the same rule "apply, where the judicial branch of the State Government "* * * should, by construction, give a different effect to a "statute, from what had at first been given to it. * * * * "* * The inquiry is, what is the settled law of the State at "the time the decision is made? This constitutes the rule "of property within the State, by which the rights of liti-"gant parties must be determined." The opinion then notices some of the effects of a diversity of doctrine in the courts, State and Federal, and, at page 300, remarks: "The "plaintiff in ejectment, after being defeated in his action "before a State court, * * to insure success, has only to "bring an action in the Federal court. *This may be easily* "*done by a change of residence, or a bona fide conveyance of*

"*land.*" [The italization is that of counsel.] "There is a "judicial conflict arising from two rules of property in the "same State * * * it is essential to the interests of the "country and to the harmony of the judicial action of the "Federal and State governments that there should be but "one rule of property in a State." And the opinion con- "cludes by overruling the decisions of this Court, and con- "forming to the decisions of the State.

Mayor, Aldermen and Citizens of New Orleans *vs.* Armas, 9 Peters, 225, (1835.) This was an action on title to land in Louisiana in the State court. The title of one of the parties was derived by patent from the United States, and they were French residents, who became entitled to the rights of citizens by the treaty with France. On writ of error, this court maintained the doctrine that the inhabitants of Louisiana enjoy all the advantages of American citizens in common with their brethren in the sister States, when their titles are decided by the tribunals of the State; and this court declined to review the judgment of the State court on title, and dismissed the writ.

Harpending *vs.* Dutch Church, 16 Peters, 455, (1842). This was a case on bill filed in Circuit Court of New York, involving the title to a tract of about sixteen acres in the city of New York. On appeal to this court, it was held that the decisions of the highest State court were conclusive.

Suydam *vs.* Williamson, 24 Howard, 427, (1860). A writ of error to the Circuit Court of the United States for New York, on title to land. Judge Catron, delivering the opinion of this court, remarks, at page 433: "The subject of this "dispute is real property in the State of New York, and her "laws exclusively govern in respect to the rights of the "parties, the modes of the transfer, and the solemnities "which should accompany them. * * * Every sovereign "has the exclusive right to command within his territory;

" and the laws which originate rights to real property are " commands addressed to the members of the State, requir- " ing them to abstain from any interference with the pro- " prietary rights they recognize or establish; and in respect " to this subject, the sovereignty of New York has not been " impaired by her adoption of the Federal Constitution. " *The power to establish Federal courts and to endow them* " *with a jurisdiction to determine controversies between cer-* " *tain parties, affords no pretext for establishing any law of* " *property.*" [The italization is that of counsel.]

Mercer County *vs.* Hacket, 1 Wallace, 83, (1863). This was a case in which the law of Pennsylvania was pressed on this court on matters arising *ex contractu.* JUDGE GRIER, in delivering the opinion of this court, in speaking of the decision of the Supreme Court of the State, says, at page 96: " If this decision of that learned Court was founded on " the construction of the constitution or the statute law of " the State, or the peculiar law of Pennsylvania, *as to titles* " *to land*, we would have felt bound to follow it."

It is therefore evident that a land-owner has no rights incident to his estate in land in a Federal court which he does not possess in the highest court of the State where the land is situate. Is this doctrine affected because appellants are not citizens of Pennsylvania? It is submitted that their measure of rights is precisely that of the citizen of the State —no more—perhaps no less.

Corfield *vs.* Coryell, 4 Wash. Circuit Ct. Rep. 371, (1823). The Legislature of New Jersey *preferred* by law the citizens of that State in the fisheries on Maurice river. A citizen of Pennsylvania sought to exercise the right, and his boat was seized. On this state of facts, JUDGE WASHINGTON, in delivering the opinion of the Court, on page 380, remarks: " The next question is, whether this act infringes that " section of the Constitution which declares *that the citizens*

" *of each state shall be entitled to all the privileges and* " *immunities of citizens in the several States.* The inquiry " is, what are the privileges and immunities, which are in " their nature *fundamental;* which belong of right to the " citizens of all free governments; and which have at all " times been enjoyed by the citizens of the several States, " which compose this Union, from the time of their becoming " free, independent, and sovereign? What these funda- " mental principles are, it would perhaps be more tedious " than difficult to enumerate. They may, however, be all " comprehended under the following heads: protection by " the Government; the enjoyment of life and liberty, with " the right to acquire and possess property of every kind, " and to pursue and obtain happiness and safety; subject, " nevertheless, to such restraints as the Government may " justly prescribe for the general good of the whole. The " right of one citizen to pass through, or to reside in, any " other State, for purposes of trade, agriculture, professional " pursuits, or otherwise: to claim the benefit of the writ of " *habeas corpus;* to institute and maintain actions of any " kind in the courts of the State; to take, hold and dispose " of property, either real or personal: and an exemption " from higher taxes or impositions than are paid by the " other citizens of the State; may be mentioned as some of " the particular privileges and immunities which are clearly " embraced by the general description of privileges deemed " to be fundamental: * * * * * * * * * * * * * " * * * But we cannot accede to the proposition which " was insisted on by the counsel, that under this provision " of the Constitution, the citizens of the several States are " permitted to participate in all *the rights* which belong " exclusively to the citizens of any other particular State, " merely upon the ground that they are enjoyed by those " citizens: much less, that in regulating the use of the " common property of the citizens of such State, the Legis- " lature is bound to extend to the citizens of all the other " States the same advantages as are secured to their own

"citizens." The act of the State of New Jersey was sustained.

Connor's widow *vs.* St. John Elliott, 18 Howard, 591, 1855.) The laws of Louisiana preferred her citizens in constituting nuptial partnership relative to property. A widow who was a citizen of Mississippi, claimed the same rights in real property, acquired during marriage, in that State, as was allowed to her own citizens. The Supreme Court of the State denied the right, and this Court affirmed the decision.

From the foregoing, although this Court has undoubted appellate jurisdiction, because of the citizenship of appellant, it is clear that it is to be exercised as a Court of the State of Pennsylvania would exercise its jurisdiction if the appellants had sued the appellees therein. In other words, the law of the State as to her own citizens upon questions incident to the ownership of real estate, is the law to the alien or to the citizen of one of the States of the Union.

Now, what right does a citizen of Pennsylvania possess, owning land on an intra-territorial river?

It will be observed that *no land is taken.* No impediment is created in the ownership. The damage is incidental and consequential, not substantial and direct.

Case of Philadelphia and Trenton Railroad Company, 6 Wharton, 25, (1840). Certain owners of property, bounded on Front street in the City of Philadelphia, who had by proceedings in partition dedicated their land for a public highway, claimed damages for the use of said highway in front of their property on the ground, that they were the owners of the soil, and that their property would be depreciated. C. J. GIBSON, in delivering the opinion of the Court, at page 43, says: "The remaining exception is more impor-
"tant because it calls in question * * * the validity

"of the statute which is the foundation of the proceeding, "and which is said to be unconstitutional because it impairs "the obligation of contracts; * * * by violating the "contract under which the right of passage is assured to "the inhabitants of this particular street; by taking the "property of the street without compensation to the * * * "individual proprietors." * * * In showing the power of the State, the Chief Justice remarks, at page 44, that she may impede navigable streams, "and the navigation of the "stream may be impeded or broken up by it at its pleasure. "In the construction of her system of improvements, Penn-"sylvania has acted on this principle. Her dams across her "principal rivers to feed her canals, have injured, if they "have not destroyed, the descending navigation by the na-"tural channels; and this without a suspicion of want of "constitutional power." * * * At page 45: "What "then is the interest of an individual inhabitant as a subject "of compensation under the constitutional injunction that "private property be not taken by a corporation for public "use without it? * * * Neither the part used for the "street nor the part occupied by himself is taken from him; "and as it was dedicated to public use without restriction, "he is not within the benefit of the constitutional prohibi-"tion, which extends not to matters of mere annoyance. "The injury of which he can complain, is not direct but "consequential. It consists either in an obstruction of his "right of passage, which is personal; or in a depreciation "of his property by decreasing the enjoyment of it; but no "part of it is taken from him. * * * * * * * The "word *taking* (in the Constitution) being interpreted to "mean taking the property altogether; not a consequential "injury to it, which is not taking at all. For compensation "of the latter, the citizen must depend on the forecast and "justice of the legislature."

Mayor *vs.* Randolph, 4 Watts & Serg., 514, (1842.) Randolph owned property which was overflowed by reason of the

grading of a highway under authority of the legislature. The Court held he had no claim for damages, as the legislature had provided for no compensation in such cases.

Navigation Company *vs.* Coons, 6 Watts & Serg., (1843.) Coons had his mill injured by the Navigation Company damming a public river under authority of the legislature. Damages were denied him.

Green *vs.* Borough of Reading, 9 Watts, 382, (1840.) Green, the plaintiff, lost the use of an alley by filling up the street in front of his house by the borough. He claimed damages, but they were denied him, as the act had been authorized by law.

Henry *vs.* Bridge Company, 8 Watts & Serg., 85, (1844.) The plaintiff had the lower story of his house closed to him, by reason of filling up for an abutment for a bridge. The authority of the State was deemed sufficient, and damages were denied him.

O'Connor *vs.* Pittsburg, 6 Harris, 187, (1851.) A church property by the cutting down of a street, was left high in the air. The property was in effect destroyed though not taken. At page 190, the Court held that "the constitu-"tional provision for the care of private property taken for public use, extends not to the case of property *injured or destroyed.*"

## II.

*That as complainants are not specially interested in navigation they cannot intervene for its protection.*

In the argument of the third proposition it will be seen that those who intervene in the Federal Courts under the clause of the Constitution which confers on Congress the

power to regulate commerce between the several States, have been such who have more interest in commerce than arises from the fact that they are citizens and owners of land.

It will be remembered that no Act of Congress has ever been passed on the subject. That body might confer on a citizen the right to inquire of, and inform upon a public right, but they have not done so. Until they do, no one but the Attorney General of the United States, or of one of the Commonwealths interested in the public waters, can of right do so.

It is because of the absence of an Act of Congress that State laws, which regulate navigation in special statutes affecting pilotage, have been maintained. Cooley *vs.* Port Wardens, 12 Howard, 299, (1851). And it was because of a special Act of Congress on the subject of the Wheeling Bridge, that the State of Pennsylvania could not enforce a decree of this Court abating it as a nuisance. 18 Howard, 428, (1855). And in delivering the opinion of the Court J. Nelson, at page 432, says: "In respect of those purely "internal streams of a State, the public right of navigation "is exclusively under the control and regulation of the "State legislature: and in cases where these erections or "obstructions to the navigation are constructed, under a "law of the State, or sanctioned by legislative authority, "they are neither a public nuisance subject to an abate-"ment, *nor is the individual who may have sustained special "damage from their interference with the public use entitled "to any remedy for his loss.*" [The italization is that of counsel.]

Public rights are protected by public tribunals upon the intervention of public officers.

In suits in which public rights are considered it will be

found that the parties to the record are the grantees of some public right which is interfered with by the act of a third party—and the restraint of judicial process is put on to save the grant. This will appear in the cases cited hereafter.

The building of the bridge is authorized by the State of Pennsylvania. The City of Philadelphia is but a branch of her government. This Court has no jurisdiction directly against the State, and the complainants hold their land subject to such qualities of estate as she may prescribe.

## III.

*That if they may intervene on their ownership of land for the protection of navigation: yet without any Act of Congress regulatiug commerce among the several States which would operate on all navigable rivers, Federal Courts have no jurisdiction to decree as prayed by this bill.*

Gibbons *vs.* Ogden, 9 Wheaton, 196, (1824). The State of New York granted to Robert Fulton and others, the "exclusive navigation of all the waters in New York, with boats moved by fire or steam." The assignees of this privilege filed a bill in the Court of Errors, praying for an injunction "to restrain any person whatever from navigating those waters with boats propelled by steam." The defendant ran a boat propelled by steam from Elizabethtown, New Jersey, to New York, and he stated in his answer that his boat was enrolled and licensed under the Act of Congress of February 18, 1793. The State Court awarded the injunction. This Court reversed the State Court, and sustained the right of a licensed vessel to enter the port of New York. C. J. MARSHALL, after stating that the power to regulate navigation depended upon the power to regulate commerce between the several States, * * *

remarks, at page 195: "It is not intended to say that these "words comprehended that commerce which is completely "internal, which is carried on between man and man in a "State, or between different parts of the same State, and "which does not extend to or affect other States. Such a "power would be inconvenient and is certainly unnecessary. "* * * The completely internal commerce of a State, "may be considered as reserved for the State itself."

The inference is unanswerable, that if a State has exclusive control over internal commerce it is because she has exclusive control over *the internal stream.*

Nelson *vs.* Blackbird Creek Co., 2 Peters, 251, (1829). The State of Delaware had authorized a dam in a tidal stream—wholly within her territory. Nelson, with an enrolled vessel, broke the dam, and was convicted criminally. This Court was asked to reverse because the State had no power to authorize the dam, but the conviction was sustained. C. J. MARSHALL remarking, at page 252: "If "Congress had passed any act, in execution of the power to "regulate commerce, the object of which was to control "State legislation over those small navigable creeks into "which the tide ebbs and flows, * * * we should feel "not much difficulty in saying that a State law coming in "conflict with such an act would be void. But Congress "has passed no such act."

Commonwealth *vs.* Breed, 4 Pickering, 562, (1827). This was a *quo warranto* against the defendant for erecting a bridge over *a navigable arm of the sea*, under the authority of a State law. The verdict found "that the inlet "over which the bridge is erected is navigable, and that the "bridge prevents the passage of vessels of a certain descrip-"tion which were accustomed to pass there before." It was held by the Court that the act authorizing the bridge over navigable waters within the limits of the State was valid.

"The legislature (say the Court) are to determine when the "public convenience and necessity require such a destruc- "tion of navigation, and upon what terms and conditions it "shall be allowed."

And see Kellogg *vs.* Union Co., 12 Connec., 17, (1837.)
City of New York *vs.* Nulu, 11 Peters, 103, (1837).

Columbia Ins. Co. *vs.* Bridge Co., 6 McLean, 70.
Jolly *vs.* Terra Haute Bridge Co., 6 McLean, 237.
United States *vs.* Railroad Bridge, 6 McLean, 517.
Works *vs.* Junction Railroad, 5 McLean, 426.
The People *vs.* Saratoga Railroad, 15 Wendell, 133.

These cases discuss the questions involved, and concede that it is for the Legislature, and for it alone, to judge of the expediency of bridging navigable streams. That the power to construct bridges over navigable waters within a State must exist somewhere, and that it is not pretended that such power has been delegated to Congress; or, if so, that they have legislated in pursuance to such power.

State of Pennsylvania *vs.* Wheeling Bridge, 13 Howard, 519. The *State* filed a bill, complaining that the Ohio was a navigable river *passing through many States;* that the defendants were building a bridge over that river at Wheeling, which would obstruct the navigation. The State further complained that she was the owner of large improvements, the value of which depended upon the free navigation of the Ohio. JUDGE GRIER refused a preliminary injunction, on the ground "that the injury would not be irremediable, if any should occur, as the owner of every boat which may be hindered or delayed in the meantime from passing along the river by this obstruction, would have a clear remedy at law to recover damages." The case was referred to a Commissioner to report if the bridge was an obstruction to navigation, and if so, how it should be altered. This Court sustained the bill, but not on any ground which is applicable to

this case. At page 581, in the dissenting opinion of CHIEF JUSTICE TANEY, there are certain remarks peculiarly applicable to *intra* territorial rivers: "The rule as to navigable "waters is this: Every independent nation has the exclusive "jurisdiction over the navigable waters lying within its "territorial limits. It has the right to regulate commerce "upon them, and to determine what bridges may be built "over them, or piers or wharves extended into them: an "erection authorized by the Legislature cannot be a nuis-"ance, public or private. This was the situation of the old "States prior to the adoption of the Constitution. Each "was then an independent sovereign State; but by the "Constitution of the United States they surrendered to the "General Government the power to regulate commerce, and "thus, while they retain their absolute territorial jurisdiction "over their navigable waters in all other respects, Congress "may forbid the erection of any structure in a navigable "stream which it deems an obstruction to commerce, and "may declare it a nuisance; but all the original authority "of the State over the river remains subject to this "limitation. For otherwise, until Congress thought proper "to legislate, navigation on the river would be under no "control."

Veazie *vs.* Moore, 14 Howard, 569, (1852). The River Penobscot is entirely within the State of Maine. For the last eight miles of its course it is not navigable. The State granted the exclusive navigation of the river to a company. The plaintiff, the owner of an enrolled and licensed vessel, was shut out. This Court upheld the law of the State.

And see United States *vs.* Bedford Bridge, 1 Wood & Minot, 407.

The course of the argument made on behalf of the appellees disregards much of that submitted on behalf of the appellants; but Philadelphia, *as a port of entry*, does not touch the mouth of the waters of the Schuylkill. The first

Act of Congress (that of March 2, 1799, Sec. 8,) is in these words: "The district of Philadelphia shall include all the "shores and waters of the River Delaware, and the rivers "and waters connected therewith lying within the State of "Pennsylvania; and the City of Philadelphia shall be the "sole port of entry and delivery of the same." By subsequent Act, (that of June 30, 1834, Sec. 5, 4 Stat. 715,) the boundaries of Philadelphia, as a port of entry and delivery, were defined as follows. "The port of entry and delivery for the district of Philadelphia shall be bounded by the Navy Yard on the south, and Gunner's Run on the north, anything in any former law to the contrary notwithstanding." All, therefore, of the argument, that the wharf of appellants is situate within the port of Philadelphia, and is therefore entitled to Federal judicial protection, falls on the geography of the case.

Perhaps no case so well as this illustrates the propriety of allowing State streams to be solely controlled by the State. For the reasons stated in the answer, the Schuylkill River is navigable about seven and a-half miles from its mouth, and the wharf of appellants is within *one hundred and fifty feet* of its upper end; yet, on a diminution of his revenue, (and that not certain,) he would interfere with the convenience and comfort of a population of over three-quarters of a million, who for years, in every mode known to our republican system, have urged the construction of this bridge. No case illustrates the maxim, *Salus populi suprema lex*, better than this.

DAVID W. SELLERS,
F. CARROLL BREWSTER,
*Pro Appellees.*